(1)
Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term - 1995

EDWARD D. COWHIG,

Petitioner, Pro Se

vs.

TOGO WEST

Secretary of the Army, Et Al

Respondents/Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD D. COWHIG, Pro Se
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158 pp

Questions Presented

1. Can the authenticity and veracity of a supposedly official document (namely the "Caraway Report") be determined when there is no official record of its existence, was not present when this plaintiff's official Military Personnel File (OMPF) was certified in the Court of Claims under seal by the government as "true and exact," in 1980, and when in 1993 the Assistant Secretary of the Army based his personal opinion as to its authenticity on "Church documents contained in Chaplain Cowhig's records?"
2. Does the continued pattern of misrepresentation, false statements, and the long standing exculpatory attempt to shift responsibility for custody and authentification of the missing "Caraway Report" from Government officials to officials in this plaintiff's Church constitute obstruction of justice?
3. Does the exculpatory efforts of Government officials in their misleading, misrepresentative and evasive statements to elected members of Congress in effect constitute practical contempt of Congress?
4. Does the continued withholding contrary to 5 U.S.C. 552(a)(4)(b), of an essential official document, which in effect constitutes the indictment against this plaintiff, violate this plaintiff's constitutional right to due process and equal protection of the law, all of which have been overlooked and ignored by lower courts and administrative officials?

5. Does not the continued avoidance of this issue of authenticity and veracity by the lower courts and the administrative body, and the utilization in their deliberations of a non-official, unauthenticated document or parts thereof, clearly addressed to the Chief of Chaplains, Department of the Army, Washington 25, DC, in 1961, as the unofficial copy maintained in church files clearly shows, constitute tainted evidence and indicate that the lower courts have seriously and to this date so far departed from the usual course of judicial proceeding or sanctioned such as to call for exercise of this Supreme Court's supervisory powers especially in the presence before the administrative agency and the courts below, of the written denial by the putative author?

6. Does not the correlation of the ABCMR's action in 1984 denying this plaintiff's application for correction of military records when the Assistant Secretary of the Army asserted "the applicant's resignation was tendered as a result of an edict of the military ordinate [sic] of the Catholic Church which stated that he either resign from the Army or lose his ecclesiastical endorsement" and the 1993 action and statement of the same individual in 1993, that his personal opinion as to the authenticity of the so-called "Caraway Report" is and was "based on Church documents"-does not this correlation constitute an impermissive entangling of Church and State

affairs and a arbitrary and capricious foundation for the 15 June 1993 action of the Army Board for the Correction of Military Records (ABCMR)?

7. Does not the entire history presented in this case manifest a lack of fairness, a denial of basic human rights of human conscience, as codified in several instruments of international law, such as the International Covenant on Economic, Social, and Political Rights (ICPR, 18, 1 and 2) and in violation of the basic rights guaranteed by the Constitution as regards freedom of religion and due process as well as equal protection of the law?

8. Does not the whole history of this case vilify, deprecate, and besmirch my reputation militarily and professionally as a Catholic Priest which reputation is a "liberty interest" protected by the Constitution and demanding strict scrutiny?

9. Is not the violation of statutory law, 10 U.S.C. 3785 (now 1185) and the code of Federal Regulations 32 C.F.R. 65.4(b)(v) by both officials in the Chief of Chaplains Office and that of the Military Ordinariate, and accompanied by Denial of Access contrary to 32 C.F.R. 581.3(d)(5)(i), to documents indicative of collusion between both entities thus bringing this case properly before this Supreme Court, which Supreme Court will not interfere in ecclesiastical matters, unless there is collusion?

10. Is not the behavior of the Chief of Chaplains office, as is evidenced from the notes of that office, discriminatory and violative of this plaintiff's rights as a Regular Army Officer in that this office made a discriminatory pre-judgment that this plaintiff was to be RAD (Released from Active Duty) even before this plaintiff had departed from Okinawa?
11. Is not a careful analysis of the Disposition Form (D Form, 1 February 1960-96) prepared by the Chief of Chaplains Office, dated 22 November 1961, particularly Item 11 - under REMARKS; "the ecclesiastical endorsing agency concerned will remove (emphasis supplied) Chaplain Cowhig's ecclesiastical endorsement if (emphasis supplied) his resignation is not accepted," indicative of this plaintiff's situation of being caught between top-sacred and top-secret; the seal of confession (conscience), and the requirements of classified information; which information this plaintiff was denied the opportunity of even hinting to the authorities of either Church or State?
12. Have not the lower courts and the administrative body (ABCMR), though the latter is not strictly bound by the Rules of Evidence, particularly 1001-1004 F.R.C.P., violated these rules by allowing in the absence of the original, an unauthentical document to be utilized, despite the presentation

to them of the denial by the putative author of preparation or authorization?

13. Is there not a very close analogy to this case at bar as in the case of Greene v. McElroy 64 S.Ct. 615, decided on 17 February 1964 by the Supreme Court and holding at 619 that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross examination", wherein the Greene case involved the deprival of a security clearance and this case at bar involves the threat of removal of an ecclesiastical endorsement which is an essential element for chaplain service in the military?

14. Have not the lower courts and the administrative body, the ABCMR so far departed from usual judicial practice and the law as to not observe, to overlook, to ignore the law in regard to records as in 5 U.S.C. 552; regarding access to such records and the civil remedies thereto; also Rule 44(b), 44(a)(i) F.R.C.P. regarding authentication, and particularly Rule 44(b) regarding the lack of record, especially when brought to the attention of the courts in paragraph 45, p.59 of my complaint and again in paragraph 52, 53 pp.44, 45 of my brief to the court of appeals for the First Circuit that this lack

of record "is admissible as evidence that the records contain no such entry?"

15. Is not the definition of fraud as is found in *Black's Law Dictionary;* "a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury," fulfilled in this case?
16. Can the Doctrine of Res Judicata be held as the controlling issue as the Magistrate Lawrence Cohen and Judge Morris Lasker have asserted below, and the Appeals Court affirmed, in the presence of fraud?
17. Is not the failure of the courts and the ABCMR to base its conclusions on the official record indicative of an arbitrary, capricious act and contrary to law, as in Friedman v. United States,(1958), 159 F. Supp. 364, 141 Ct.Cl. 239.?
18. Does not this case make clear the continued arrogance of the ABCMR and their exculpatory behavior in trying to foist responsibility for an official document as to its custody and authentication onto officials of my church?
19. Why is this supposed official document which the Government at various times has called "official," "forwarded through channels," "properly prepared," not now in official custody

and who, is responsible for its, so called by the government, "missing" status?

20. Can it be called fair, full process of law when this plaintiff through inadequate counsel by a lawyer friend that this plaintiff had plenty of time to respond to the court of claims in 1980-81 whereas this was not so, and consequently this non-lawyer, plaintiff acting pro se had his brief declared late, moot, and his motion to revoke the statute of limitations decision, denied, thereby providing the basis for future res judicata opinions, despite the presence of fraud?

21. Do not the stipulations of title 5 U.S.C. 706, brought to the attention of courts below in regard to the scope of review hold in this case in several ways including paragraph (f) therein which states: "unwarranted by the facts to the extent that the facts are subject to trial de novo by a reviewing court and the "whole record" and the "rule of prejudicial error" are to be considered"?

22. Can it be considered fair when the Judge in the district court of Massachusetts who was the first to hold "res judicata" and uphold statute of Limitations on 31 March 1982, stated that "The Board (ABCMR)" after examinations of all the pertinent documents;" and that "the Board considered the entire administrative record;" when this was clearly not the truth?

23. Can it be called fair when the Magistrate Judge on 6 April 1995, emphasized this plaintiff's many, as he called them, "forays" and failed to consider the 1993 actions of the Assistant Secretary of the Army (8 March 1993) and the consequent action of the ABCMR on 15 June 1993 (the main thrust of my complaint) wherein the government implicitly admitted that they have no official "Caraway Report" but based their 1993 decisions on a personal opinion of the acting Assistant Secretary of the Army based on church documents, a denial of new evidence contradicting the contents of the so-called "Caraway Report;" and clear evidence of the impermissible intermingling of Church and State?
24. Can it be called fair on just, that despite several demands for a jury trial, and so noted on the docket sheet, this plaintiff has been denied this basic right?
25. Can it be called fair or just that this plaintiff has been denied the opportunity for oral argument since 1982 at which time the statute of limitations, on which res judicata has been constructed, was maintained against this plaintiff?
26. Can the actions of the Army Board for the Correction of Military Records be called fair and/or consistent with 10 U.S.C. 1552 "to do justice" and "remove an injustice?"

Rule 14.1(b) List of all Parties

Togo West, Secretary of Army

Army Board for the Correction of Military Records (ABCMR)

Archdiocese for Military Services, USA (though this latter party was not listed in original complaint but certainly is an interested and concerned party).

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United States v. Provident Trust	Par. 29, p. 36
Weyant v. Utah Savings	Par. 50(e), p. 44

Authorities

Black's Law Dictionary	Questions 15, p. 6
98 Federal Rules Decisions	Par. 22, p. 34
Moore (0.405)	Par. 50(c), p. 43
Thayer	Par. 29, p. 36
Vestal	Par. 50(f), p. 44
Witmore	Par. 24, p. 34
Wyzanski	Par. 11, p. 29

Other non-legal/judicial authorities involved at one time or another:

Speakers McCormack and O'Neill

Senators Kennedy, Kerry, Tsongas

Representatives Studds, Moakley, Moran, Livingston, Burke, Mavroules

Cardinals Spellman, Cushing, Medeiros, O'Connor, Law

Generals Caraway and Weyand

The Assistant Secretary of the Army

Rule 14.1(f) **Law - Regulations - Rules**

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Question 14, p. 5, 6;
Par. 42, p. 40

Title 5 U.S.C. 706 (Scope of Review) Question 21, p. 7

Title 10 U.S.C. 1552 (Correction of Record) Question 26, p. 8

Title 18 U.S.C. 2071(a) and (b) (Removal of Record)
Par. 53, p. 53

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Title 18 U.S.C. 242

Deprevation of rights under Color of Law
Par. 103 of Comp.

Title 18 U.S.C. 247

Obstruction of persons in the free exercise of their religious rights — Par. 103 of Comp.

Title 42 U.S.C. 1983

Liability for depreviation of rights — Par. 103 of Comp.

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(The above have been presented to the lower courts and are expressed verbatim in the Appendix to the best of my ability.)

Previous History of Other Court

and Administrative Actions

(In Chronological Order -

See enitre Volume A of Complaint Exhibit)

ABCMR - 14 August 1974 - ABCMR Hearing -

Involuntarily released under 10 U.S.C. 3785

13 April 1978 - (ABCMR Hearing denied)

26 March 1980 - (ABCMR Hearing denied)

10 September 1980 - (ABCMR Hearing denied)

Ct.Cl. No.- 427 - 80C - Dismissed 27 February 1981 -

under Statute of Limitations, merits not considered

Motion to Revoke - Denied - 3 April 1981

D. Ct. (Mass) - 81 - 1616C - 31 March 1982 - barred by Res Judicata

Ct. App.(1st Cir) F2 - 1352 - Affirmed Lower Court -

22 November 1982

Ct. App. (Denying Rehearing) - 17 December 1982 - Cert. Denied

21 and 26 September, 1983 (ABCMR Hearing

29 March 1984 - Application denied by ABCMR

D. Ct. (Mass.) - 86-2192Y - Action barred by Res Judicata

App. Ct. - Affirmed lower court, rehearing denied

Ct. App. (1st Circuit) - Rehearing denied - 11 January 1989

Cert. Denied

D. Ct. 90-Cv-11297 - RICO violation - denied barred by Res Judicata

Ct. App. (!st Circuit) - 91-2027 - 27 March 1992 - Lower court affirmed

Ct. App. (1st Circuit) - 92-1440 - Denied, Res Judicata

7 December 1992 - Limitations

Ct. App. (1st Circuit) - Pet. rehearing denied 5 February 1993 - Cert. Denied

Present Case History

Rule 14.1(d)

Citations of the official and unofficial reprints of opinions and orders entered by the Courts or administrative agencies in this present case

Letter to Congressman Joseph Moakley, 8 March 1993 App. F

Denial of reconsideration by ABCMR - 15 June 1993 App. G

Complaint Filed - 16 June 1994 (94-11225 MEL)

Report and recommendation of Magistrate Lawrence Cohen - 6 April 1995 App. C

Order of Judge Lasker dismissing case -26 April 1996 App. B

Order of Judge Lasker denying motion to revoke order of 26 April 1995, holding that the issues are barred as "Res Judicata" - Dated June 13, 1995 App. B

Motions under Rule 59 and 60 F.R.C.P. are denied as not applicable, 30 June 1995 App. B

Appeal motion 30 June 1995

Oral argument "not needed" - Ct. App.. - 6 September 1995

Case Numbers 95-1695, and 95-1991 consolidated - 25 October 1995

Appellees granted leave to file supplemental appendix - 22 August 1995 - by U.S. Court of Appeals - 95 - 1695

U.S. Ct. Appeals (1st Cir) affirms judgment of District Court - 15 November 1995 App. A

Judgment entered 15 November 1995 App. A

Motion for rehearing denied - 11 January 1966 App. D

Appeal for certiorari - January 1996

Petition for extension of time granted by Justice Souter
to 9 June 1996 on 7 March 1996 A-743 App. E

As this plaintiff expressed it on the cover of his complaint filed on 16 June 1994, numbered 94-11225 PBS, later MEL: Pursuant to Title 28 U.S.C. 1331; 1346 this petitioner seeks Judicial Review of the actions of the Acting Assistant Secretary of the Army, 8 March 1993 and the actions of the ABCMR of 15 June 1993, taken in regard to Title 10 U.S.C. 1552 whereby reconsideration under that title was denied to this complainant. Original jurisdiction is founded under Title 28 U.S.C. 1331 (Federal Question) U.S.C. 1346 (US as defendant) and 1361 (action to compel); also 280 U.S.C. 1254(i). This complaint is timely filed under 28 U.S.C. 2401. These actions have a fundamental significance to the entire history of this controversy indicative of the violation of this petitioner's Constitutional rights. It seems as if the Court of Appeals has decided an important question of Federal Law which should be settled by this court.

(i) US Court of Appeals, First Circuit, Case No. 95-1695, 95-1991, Judgment entered 15 November 1995; rehearing and suggestion for rehearing en banc denied 11 January 1996; extension of time granted by Justice Souter on March 7, 1996, up to and including 9 June 1996, for petition for writ of certiorari.

28 U.S.C. 1331; 1346; 1361 proper notification will be done by first class mail in accord with Rule 29.4(a).

(ii) Jurisdiction is based as is stated above under rule 14.l(e) wherein this plaintiff seeks as he has sought in the courts below Judicial Review of the actions of officials in the government, the Army Board for the correction of Military records (ABCMR) on 8 March 1993 and 15 June 1993, actions taken in regard to the stipulations of title 10 U.S.C. 1552, particularly in the light of their legislatively mandated and abiding duty "to do justice" and "remove an injustice."

Rule 14.1(f) (Verbatim in Appendix)

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(Liability for Deprivation of Rights)

42 U.S.C. 1985 (Conspiracy to interfere with Civil Rights)

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Rule 14.1(g) **Short Statement of Case**

This case concerns the violation of a Regular Army Officer's rights who is about to be separated, released from active duty (RAD) as the Chief of Chaplain's office had previously determined even before this plaintiff had left Okinawa. The obvious collusion between the two entities of Church and State without the knowledge of the plaintiff or the opportunity to confront, cross examine or in any way rebut the allegations, makes manifest the lack of due process and the violation of this plaintiff's rights under the 14th amendment of equal protection of the law. Even medical diagnoses no matter how flawed were withheld from this plaintiff, and no treatment for any reason was offered.

The government used the power of the Church to do its bidding and ever afterwards attempted to hide under the skirts of the church to this day.

The Church has frequently asserted that they acted principally because of their reception of the so-called "Caraway report" which is now "missing" from government files. As late as 3 March 1995 in a letter from Archbishop Joseph T. Dimino, Archbishop for the Military Services, U.S.A., to my religious superior in Boston, Bernard (Cardinal) Law, Archbishop Dimino stated: "...the action of the Military Ordinariate in October of 1961...was based principally on the 'Caraway report'" and "we are not, and never

have been, a custodian of Military records." (pet. for rehearing to Ct. App. 1st Cir.; App. C, p. 6)

Appendix C, p. 3 contains a copy of Lt. General Paul W. Caraways' denial of authorship. Also App. 18, M of Complaint. Duplicates are admissable under Rule 1003 F.R.C.P. unless there is a genuine question as to their authenticity or it would be unfair in the circumstances Speaker O'Neil was told in 1978 there was no letter to Army officials or to Cardinal Spellman. (App. X herein). Rule 14(h)

Argument

1. I am a simple Catholic priest ordained in 1945. In 1950, when the Korean conflict erupted, Cardinal Spellman of New York, as the Military Vicar in the United States asked Archbishop Cushing of Boston to request volunteers for the military service. I responded and volunteered for the paratroopers entering active duty on 2 January 1951, having taken the oath to uphold the Constitution.

2. I served with the paratroopers for eleven years except for the tour of duty in Korea (1953-1954). In June of 1960, my unit, the Second Airborne Battle Group, 503rd Infantry was sent to Okinawa as a combat team. I was cleared for Top Secret classified information on a need-to-know basis as a member of the staff of the 503rd.

3. The basic reason for this petition for a writ of certiorari is my strong conviction that the lower courts have seriously, and to this

date, so far departed from the usual course of judicial proceedings or sanctioned such a departure by a lower court and an administrative body (the ABCMR) as to call for the exercise of this Supreme Court's supervisory power, in a matter of most important public policy, Chaplain service in this country's military forces, otherwise Chaplains are not servants, but slaves. Also involved is a conflict with a decision of the 10th Circuit in Korholz v. United States (par. 39, p. 43) in regard to whole "disregard" of the law.

4. The reason, the proximate cause for my separation as admitted, stipulated by both Church and State was the supposed existence of a report, henceforth called the "Caraway Report."

5. Despite all the written words describing the contents of this "Caraway Report" as facts in various administrative and judicial proceedings, the issue of ultimate fact has never been determined in any of these proceedings. The copy of the "Caraway Report" transmitted to my Church authorities in 1961 was withheld from this plaintiff until 4 August 1980.

6. After General Weyand, as chief of Legislation Liaison, wrote to Speaker to McCormack in 1964, asserting that the "Caraway report" was to Cardinal Spellman. I wrote to the Chief of Chaplains' Office requesting a copy of my complete file, official or informal, but received no response at all. At the same time the Military Ordinariate refused to give me a copy of their copy. How can anyone defend oneself in such a situation? Even the diagnosis

prepared on Okinawa two days before I departed that island and the mere repetition thereof at Walter Reed General Hospital (without analysis) were denied to this plaintiff for many years, which diagnosis by the way has been challenged since by many doctors, notably Dr. Roark, as late as 1991, and Dr. Rohde in 1985, as an indication of poor medical practice. Previous to 1980, extracts from a copy of that "Caraway Report" were sent to my religious superior in Boston by the Military Ordinariate in 1962 and these extracts were again utilized in hearings before the Army Board for the Correction of Military Records (ABCMR) in 1974, and in further petitions to that Board.

7. In a hearing before that same board (the ABCMR) in 1983, the copy of the "Caraway Report" supplied by this plaintiff was again utilized. The contents of this copy were referred to throughout the hearing as the genuine facts. For instance a member of the ABCMR, Mr Lavigne in questioning my Commander (Col. Ret. Robert E. McMahon), asked: "Colonel, I'd like to understand a little bit more about the relationship between the church and the Military in the appreciation of Father Cowhig's situation. In looking over in some detail the exhibits that have been submitted, I don't find anything other than the Corps Commander's letter (i.e. a copy of the "Caraway report") that would indicate there was a problem in Father Cowhig's performance of duty or his ability to respond to your command, except for the last OER (Officer

Efficiency Report) that you and Colonel McCoid had initiated and since indicated was in substantial error,..." (Vol. C, pp. 250, 251 of Complaint, Exhibit F - Text of 1983 ABCMR Hearing.)

8. At this hearing before the ABCMR in 1983, the medical testimony of a competent witness was denigrated, vilified as having been influenced by the doctor's employment in my case. (See Dr. Roark's written reaction in 1991 to this. Vol. B, Tab G, pp. 62-70 of Complaint, extract follows) (See App. S and T herein.)

9. In 1991, Dr. Roark wrote to this plaintiff a letter which I submitted to the ABCMR as new evidence but was rejected. Dr. Roark in part stated: "As you will recall in my testimony before the ABCMR, I drew upon my five hour psychiatric examination of you on September 7, 8, and 23, 1983, plus the report from Wolfgang Riedel, PhD, of his three hours of psychological testing on September 7, 1983. The opinion expressed in the Dissent that my examination of you was invalidated by the twenty plus years that had passed since your illness on Okinawa (1960-61) does not take into account the intensity, thoroughness, and sophistication of your eight hour examination by Dr. Riedel and myself. The dissent also shows naivete in assuming that the "facts" I adduced from my examination were based solely on your verbalized memory of events in your life twenty years earlier. Another implication in the Dissent was that my clinical judgment was impaired or unprofessionally influenced by my retention by your attorney for

the sole purpose of facilitating his presentation of your case. I interpret this implication as suggesting that my conclusions were less than objective, if not myopic in effect; and that my motive in accepting your case was less than professional, both of which implications I reject outright. The opinion of the Board (which consisted entirely of non-medical members) should have been reached on the basis of weighing all the facts, as presented, not (as in the Dissent) devaluing the conclusions of the examining psychiatrist." (Vol. B, Tab g, Complaint, Exhibit at p. 63, 64, and 65) Also "once again, I believe that the outcome of your hospitalization in WRGH (Walter Reed General Hospital) represented an error in diagnosis and medical management of your case" (idem. p. 68) [emphasis supplied].

10. Other medical and military, oral and written, testimony to this plaintiff's benefit apparently was not persuasive in 1983 to the two minority dissenting members, whose rationale the assistant Secretary of the Army, Mr. William Clark, accepted while rejecting the 3-2 majority decision in this plaintiff's favor and thereby denied my application and any possible relief. Later written medical and military testimony (as by Dr. Roark in 1991), of my commander and executive officer (both in 1985), as new evidence, was spurned by the ABCMR as "repetitious and based on emotion" in the 1985-86 time period. Other relevant new evidence contradicting the contents of the "Caraway report" by one of my fellow officers, Lt.

Col. (Ret.) T. Kelley, was rejected. He was knowledgeable and on the scene in 1961. (See App. U and V.)

11. "Without judicial enforcement, written constitutional declarations of civil liberties are apt to be mere admonitions. Absent the institutional framework for their vindication they will have no greater force than the parson's injunctions. . . . but our tradition has always emphasized the role of courts in preserving fundamental rights" (The Bill of Rights by Learnard Hand - the Oliver Wendell Holmes lectures, 1958, introduction by Charles E. Wyzanski, Jr., Athenaeum, New York, 1986

12. I am a parson, of the Catholic persuasion, and so far it seems as if my allegiance to the court system and the Rule of Law is of the character described by Judge Wyzanski. No one seems to care or pay any heed. In fact, in magistrate Lawrence Cohen's report, 6 April 1995, to Judge Lasker of the District Court in Boston, he seems to ridicule my efforts as successive multiple "forays" to Courts, overlooks fraud and relies on the principles of "res judicata" while denying the presence of new evidence, and this the First Circuit Court of Appeals affirms, despite my objections to the obviously impermissible intermingling of Church and State affairs and the violation of law.

13. I have contested this injustice in every way I could or was allowed to do even before I was separated from the Army in January 1962. (Vol. A of Complaint, pp. 194, 195) I have

persevered to this point in 1996 with all due diligence, despite obstruction.

14. On 8 March 1993, the Acting Assistant Secretary of the Army (Manpower and Reserve Affairs, Mr. William D. Clark in a letter to Congressman Joseph Moakley, asserted among other things; "although General Caraway did not later recall preparing his 11 October 1961, letter concerning Chaplain Cowhig, I personally have no doubt as to its authenticity based on Church documents [emphasis supplied] contained in Chaplain Cowhig's record." (App. Vol. B, p. 84 - Complaint Exhibit)

15. This above letter was followed on 15 June 1993 by another letter from the Executive Secretary of the Army Board of the Correction of Military Records (ABCMR), which comes under the supervision of the Assistant Secretary of the Army, asserting that this plaintiff's request for reconsideration had been denied, since "no new evidence" had been presented. This is not so. Who determines the newness of evidence?--the defendant?

16. The first letter (8 March 1993) of the acting Assistant Secretary of the Army proves beyond any shadow of a doubt what I have been insisting on for years, namely, that the government does not have in its custody, which it should have if it is an official document, any record of the infamous "Caraway Report." The Government does not only, not have any official document from Lt. Gen. Caraway pertaining to this plaintiff, but has consistently and

falsely asserted that the "Caraway Report" was to Cardinal Spellman in New York. (Vol. A of Complaint at pp. 374, 375) This assertion was made by the Chief of the Congressional Liaison as far back as 1964 in a letter to Speaker John McCormack, my Congressman, to whom I had gone for assistance. Several times over the past thirty-four years, the ABCMR has asserted that the "Caraway report" was "properly in church hands," "properly prepared" and "only they (i.e. Church authorities) can authenticate" that report. Such nonsense and exculpatory behavior is not to be condoned. I shall prove with the necessary particularity what the defendants knew or should have reasonably known and failed to consider in making misleading and inaccurate statements. This also was presented to the Courts below.

17. Besides the original misrepresentation to Speaker John W. McCormack in 1964 that the letter/report of Lt. Gen. Caraway was to Cardinal Spellman (Vol. A at pp. 210, 211 of Complaint Exhibit), there is the statement of 23 September 1982, by the Executive Secretary to a Ms. Locke instructing her as to the formation of a letter to Congressman J. Joseph Moakley regarding this case, including this assertion regarding the Caraway letter, "which is now properly in the files of the Military Ordinariate in New York City." (Vol. A, at p. 200 of Complaint Exhibit); so again on 19 June 1984 in a Freedom of Information Act (FOIA) request and after the 1983 ABCMR hearing, the Executive Secretary of the ABCMR

stated: "After twenty years, the Board is unable to ascertain why the original letter/document from Lieutenant General Paul W. Caraway is not currently in military files. However, it would appear that the original letter/document is or was in the hands of your Military Ordinariate in New York." (Vol. A at p. 247 of Complaint Exhibit). Interestingly on the same page, there is the statement that the letter "was not critical" and that "the Board made no attempt to determine its authenticity." (See App. X herein.)

18. Prior to this last quoted statement, the ABCMR in 1980 responded to Senator Paul Tsongas' direct inquiry into the authenticity of the "Caraway report" or even its existence (Par. 38, p. 48 of Complaint, and App. thereto, p. 67) by stating, "the letter is in the Church files and the authenticity can be determined only by the Church officials." (Vol. A, p. 387 of Complaint Exhibit). There is more of this type of behavior or fraud in Par. 38, pp. 48-50, Complaint Brief, including Senator Tsongas' 1984 letter to the ABCMR. (Complaint App. 7)

19. In this 1984 letter, Senator Tsongas repeated the question of 1980: "Why is the original letter/document from Lt. Gen Paul Caraway not currently in military files? This question was never satisfactorily answered in your reply of 1980. Your recent decision raises it again." [emphasis supplied] The government previously stated in correspondence with the late Speaker Thomas P. O'Neill,

Jr., in 1978 that there was no record of any correspondence from Lt. Gen. Caraway to either military authorities or to Cardinal Spellmn (Vol. A, at p. 385 - Complaint Exhibit). (See App. X herein.)

20. In addition to the above observations, there is additional evidence in the discussions and conclusions of the ABCMR of something seriously flawed when they denied this plaintiff a formal hearing on 10 September 1980.

21. First, the ABCMR concluded in Paragraph 1 that "a letter was forwarded through channels;" in Paragraph 2 that the "authenticity of the letter in question, can be determined by the Church authorities...." (Complaint Appendix 1, Par. 1 and 2) In Complaint Appendix 2 therein there is this statement about the Caraway report: "This letter was addressed to Church officials." Such nonsense, error, and inaccuracy should not be allowed. It is inexcusable carelessness and recklessness, indicative of arrogant malice. Chief Justice Earl Warren in Dissenting in the Perez v. Brownell case in 1958 stated" "...citizenship is a man's basic right for it is nothing less than the right to have rights...." It certainly follows that a citizen chaplain does not lose his basic constitutional rights.

22. "The complaint, in order to survive a motion to dismiss, must identify with particularity exactly what it is that the defendants knew and failed to consider in making the allegedly misleading and

inaccurate statements. That is the essence of fraud" 98 Federal Rules Decisions - 98 Goldman v. Belden 733 (1983) at 738.

23. In addition to the above described behavior, access to any copy or duplicate of any so-called official report was denied to this plaintiff by both Church and State until 4 August 1980, after personally meeting with Lt. Gen. Caraway and his investigation and his dispatch to me in June 1979 of his denial of preparing any report about this plaintiff and his most positive statement: "...I did not prepare a letter concerning you," and "...No letter concerning you was prepared by any member of my staff or by any employee in my headquarters with or without my consent." (11 July 1979-Vol. A, p. 196 Complaint Exhibit)

24. Yet, this most positive statement of Lt. Gen. Caraway and the fact that the government does not have any so-called "Caraway report" has not stopped the ABCMR and the court's below from utilizing the unofficial copy held in the files of my church for many years, without any access thereto by the plaintiff until 1980. To this non-lawyer, pro se plaintiff, such behavior more than hints of the use of "dishonest evidence," and the violation of constitutional guarantees. Professor Witmore describes the need for authentication as "an inherent logical necessity."

25. This plaintiff called the attention of the Appeals Court to this use of unofficial documents and the arbitrary rejection of competent medical testimony in Paragraphs 30, 31, and 32 of my brief to that

event. (App. Brief, p. 20) I repeat again the cases cited from the Court of Claims.

26. "Where it is apparent from the record that the medical records submitted by the applicant for correction clearly establish a sufficient basis for such correction, the court will find that the Board acted in an arbitrary and capricious manner in refusing to correct the record and also the denial of relief sought was not supported by substantial evidence on the record before the Board. (Lawler v. US 1965 60 Ct. Cl. 644, 10 U.S.C. 1590, Note 60.)

27. Also in paragraph 31 of my brief to the Court of Appeals, in reference to the content of Paragraph 30 therein, I quoted an opinion of the Court of Claims as to the importance of any Correction Board basing its conclusions on an official record.

28. "Where former Army officer applied to the Air Force Board of Correction of Military Records to have his military record with regard to disability corrected, failure of the Board to carry out its statutory obligations and base its conclusion on official record before it, was arbitrary, capricious, and contrary to law." (Friedman v. United States 1958, 158 F. Supp. 364, 141 Ct. Cl. 239)

29. This Supreme Court has an obligation to the truth and a rational inquiry to the truth.

"The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our

conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.' Thayer, a Preliminary Treatise in Evidence, 530; Funk v. U.S., 290 U.S. 371. This court has refused to accept assumptions of fact which are demonstrably false, United States v. Provident Trust Co, 291 U.S. 272 even when agreed to by the parties, Swift and Co. v. Hocking Valley R. Co., 243 U.S. 281."

30. The truth must out! This plaintiff was serving as a paratrooper priest on Okinawa in 1960-61 with top secret clearance, and in possession of top-secret information, on a need-to-know basis in hazardous circumstances and in conformity with the regulations described for Chaplains in the Code of Federal Regulations (C.F.R.) 32 510.1, titled "private ministrations, sacraments, and ordinances," and in a very tense atmosphere, both militarily and geopolitically. I was instructed to prepare my will and did so in May 1961.

31. "Chaplains will administer or arrange for rites and sacraments for military personnel and civilians under military jurisdiction according to the respective beliefs and conscientious practices of all concerned. (R.. 125; 10 U.S.C. 238) (16 F.R. 12931, Dec. 27, 1951) (See par. 28 and 31 of Complaint.)

32. This plaintiff could not reveal the nature of the military situation prevailing in Southeast Asia in 1960-61 to anyone who

did not have a "need-to-know." That included my religious superiors in New York and Boston and even Speaker John McCormack.

33. This plaintiff was a Regular Army officer who in 1960-61, as the government has stipulated or stated, had an efficiency score of 135 out of a possible 150, placing him in the top 5% of all captains. This plaintiff was permitted to apply for Regular Army status by the Church on 15 November 1955, and after confirmation by the U.S. Senate took the oath of office on 2 April 1957, hence beyond any probationary period.

34. This plaintiff, as a Regular Army officer, was entitled to the rights and privileges granted to regular Army officers under 10 U.S.C. 3785 then, 1185 now, and other pertinent articles pertaining to the separation of a Regular Army officer.

35. However, none of these statutory laws and the rights guaranteed by law were afforded this plaintiff. Upon receipt of a copy of the "Caraway report" from the Chief of Chaplains, to whom it was addressed, my Church authorities believing it to be authentic and authored by a 3-Star General demanded my resignation without any fair hearing, despite an interview with the chancellor of the Military Ordinariate in New York, at which I was constrained by the demands of security classifications.

36. At this interview, the Chancellor stated: "Ed, I am the umpire, when I say you are out, you are out." This behavior is completely

at variance with the requirements and agreements between a faith body endorsing agency and the government as expressed in 32 C.F.R. 65.4 (b)(v) - "to abide by the applicable regulations and the policies of the Department of Defense." The ecclesiastical principles of subsidiarity were violated, and any right of due process in Church Affairs was ignored.

37. This was a threat and has been so considered by the government and the courts below. However, by this same regulation in the Federal Code, the endorsing agency has the power to withdraw its endorsement (32 C.F.R. 65.4(b)(ii). What is one to do, caught between a rock and a hard place, between top secret and top sacred?

38. In fact, the mutual cooperation in 1961 between the Chief of Chaplains' office and that of Church officials in the Military Ordinariate was a "concerted action" of the two entities without any fair hearing in violation of basic practice, statutory law and Federal regulations and should constitute "joint tort feasors." It has a "star chamber" odor. The presence of the toxic "Caraway report" hidden in the files of the Church, like a virus in a computer had serious and harmful effects on this plaintiff when seeking reentry during the war (see Chaplain, Major General Francis L. Sampson's letter in Appendix herein, App. R).

39. Willfulness encompasses reckless disregard for the law in this case 10 U.S.C. 3785 (now 1185) "...a defendant would not be

guilty of a criminal offense...or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not." Korholz v. U.S., 269 F. 2d 897, 903 (10th Cir.) (1959), Cert. Den. 361 U.S. 929, 80 S. Ct. 367, 4 L.Ed. 2nd 352.

40. This Supreme Court has stated "matters involving the most intimate and personal choices a person may make in a lifetime...are central to the liberty protected by the 14th Amendment. The heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life." (Planned Parenthood v. Casey, 1992)

The Issue

41. The main pivotal issue which is a real triable (Rule 38(b) F.R.C.P..] and genuine issue of fact,...for which this plaintiff has not been given the right to a jury trial despite having so demanded as is stated on the docket sheet, ignored by the District Court (and since by the Appeals Court) in its judicial review of the 1993 actions of the Assistant Secretary of the Army and the denial of reconsideration by the Army Board for the Correction of Military records in 1993 (ABCMR), I repeat, the main pivotal issue is the authenticity and veracity of the so-called "official "Caraway report" of 1961 (Vol. A, pp. 361-365) and General Caraway's denial of any

such report (Vol. A, p. 226 along with this plaintiff's affidavit (Vol. A, p. 394, 395) prepared and sworn to 28 February 1981.

42. This so-called "official report" has been constantly and consistently withheld from this plaintiff despite complaints on this matter under Title 5 U.S.C. 552 (a)(4)(B). See par. 44(a) of 1994 Complaint. Please remember that the unofficial copy of the "Caraway report" contained allegations of failure and delinquency in religious duty.

43. This violation of due process has been further compounded by the government's attempts to conceal their proper responsibility of custody of the same by attempting to foist, to palm off custody and authentification of this "Caraway report" onto this plaintiff's Church authorities (Vol. A, p. 200, 247, 385, 387, 423) who have frequently disclaimed any responsibility for custody of official military documents or implicitly their duty to authenticate such (Vol. A, pp. 242-244; see also Vol. A, p. 247; also par. 44 and 45 of my Complaint in the District Court, pp. 59-62.)

44. This genuine issue of fact, triable in a court of law before a jury of peers, is most important now in 1996 in view of the latest decision of the District Court (and the Appeals Court in 1996) to dismiss my petition for judicial review of the actions of the Assistant Secretary of the Army in asserting his personal opinion of the authenticity of the "Caraway report" based on unofficial, unauthenticated "Church documents" and the ABCMR's denial or

reconsideration (15 June 1993) saying there was "no new relevant evidence."

45. These were the latest decisions of the government, inapposite to a holding of limitations statute or res judicata, and are subject to review on the basis of the "abiding duty" of the ABCMR according to Title 10 U.S.C. 1552, to "do justice" and "remove an injustice" and are not barred by any invocation of res judicata or statute of limitations of previous actions, as fraud has been pervasive. Unreasonable, arbitrary capricious, and illegal behavior as well, is ostensible. Legal error is clear.

46. Any presumption of "substantial deference" ordinarily granted to an agency board has been abdicated by their arrogant, duplicitous behavior and reckless disregard for the law. The Board has become a master of circumvention by circumlocution. Any usual deference to the military is also to be set aside. The Court of Claims has stated: "The single judicial claim--not a new cause of action, never accrues...until the Correction Board's decision." (Hamlin v. U.S., 391 Fed. 2d 941, 1968) at 944.

47. Further indications of continuing "due diligence" on the part of this plaintiff, beside the long, long history of legal and administrative actions (see Vol. A of Complaint in its entirety) may be observed in the testimony of Dr. Roark in answer to a question by a member of the ABCMR in 1983: "Well, I don't know whether he thinks of himself as a crusader. I think he may well function in

that capacity, in terms of how diligent he's been in persevering in bringing his case to the attention of the authorities." (Vol. C of Appendix in District Court, p. 215B.)

48. Please remember that this due diligence was in the presence of misrepresentation going back to 1964 to Speaker McCormack (see Vol. A, Exhibit, pp. 210, 211) stating that the "Caraway report," "the immediate or proximate reason for the action" (my separation) was "to Cardinal Spellman" throwing this plaintiff off track for many years as Church Authorities also denied access until 1980, to even a copy.

49. What is at stake here and at issue is not only the improper invocation of res judicata or other defenses raised by the defendant in court but the behavior of the ABCMR in 1993 in denying reconsideration despite new evidence and having ruled in 1974 that my resignation of 1961 was involuntary and offered under duress, "a half-a-loaf," and in effect no remedy at all. (See DeBow v. United States 193 Ct.Cl. 499, 434 F. 2d 1333 (1970 cited in Par. 28, p. 16.) [in Appeals Brief]

50. The following extract quotation was presented in my "Objections" to the Judge Magistrate's recommendation and also to the Appeals Court: (Paragraphs 68 ff. therein)

a) In regard to "admissible matter," as far as the doctrine of res judicata goes in barring "whatever could have been offered in a previous action" as the magistrate states, should not hold in the

case of fraud, concealment, removal, or mutilation of record, paper, etc., covered as a punishable crime under 18 U.S.C. 2071. This bar of res judicata should not hold in the presence of obstruction of proceedings under 18 U.S.C. 1506--"otherwise avoids any record"--"in any court." How about the false certification as "true and exact" without any "Caraway report" in the Court of Claims action 24 November 1980 or is it false? Now you see it, and now you don't! This action in the Court of Claims being the base and foundation of further "res judicata" holdings.

b) "Because res judicata may cover grounds and defenses not previously litigated, it blocks unexplored paths that may lead to the truth. For sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It is to be invoked only after careful inquiry (Brown v. Felsen (1979) 442 US 127, 995.CT2205, 60 LED 2nd 767).

c) Also, "the court (in the above case) went on to hold that res judicata would not be applied to preclude examination of the issue of fraud..." (Moore, O.405(11) p. 257)

d) As regards due process and the importance thereof the Supreme Court has stated: "a judgment obtained in violation of procedural due process is not entitled to full faith and credit..." (Griffin v. Griffin 327 US 220, 1946).

e) Here's another case which is pertinent here in opposition to the magistrate's recommendation. "The use of perjured testimony does

not under the usual view, constitute intrinsic fraud, but the active concealment of material evidence which the party has a duty to disclose may." Weyant v. Utah Savings and Trust Co., 5 Utah 181, 182, p. 189, 9 ALR 119 (1919).

f) In regard to the infringement of Constitutional rights which is an issue in this case at bar, Professor Alan D. Vestal asserts: "It is a familiar principle, the United States Supreme Court has stated that res judicata is inapplicable in habeas corpus proceedings. this concept would seem to carry over in all litigation concerning constitutional rights. These matters are so fundamental that a court may be reluctant to hold that a litigant can be deprived of such rights by a prior adjudication of a controlling fact issue." Res judicata/Preclusive, Alan D. Vestal (1969), Ch. 13, p.408, 409.

g) Again, "conventional motions of finality of litigation have no place where life, liberty is at stake and infringement of constitutional rights is alleged..." Sanders v. U.S. 373 US 1, 8, 83 SCT 1068, 1073, 10 LED 2nd 148 (1963)--as is asserted here.

h) In regard to the basic violation of my rights 10 U.S.C. 3785 (now 1185) and 10 U.S.C. 3784, ignored by both the Chief of Chaplains, Army, the office thereto and the Military Ordinariate in 1961, this following citation may enlighten this court to the issues involved herein. "Military Correction Board can correct an injustice not amounting to legal error, but for the Court of Claims to grant judicial relief there must be an unlawful act made so by

violation of a statute or regulation or published mandatory procedure or unauthorized act or so unsupported by evidence as to be a gross injustice, unlawful because of clear legal or factual error, manifest abuse of discretion or arbitrary and capricious action amounting to bad faith or fraud and seriously prejudicial." (Skinner v. US Ct. (1979), 594F 2nd 824). (See also Mulvaney v. Stetson, 493 F. Supp. 1218 (1980), 37 years after discharge, Addenda G, Attachment M of "Objections.")

51. The continuous employment of partial extracts of the unofficial "Caraway report" in 1974 and the use of an unauthenticated document from church files in 1983, tainted evidence at least, and the personal opinion of the Assistant Secretary of the Army "based on Church documents" in 1993 should not be permitted, particularly in the face of preponderant opposing evidence (Vol. A, pp. 227-360) to the contents of the putative "Caraway report," now "missing" from government custody. (Vol. A - at 247) The cumulative, contradictory evidence and testimony in addition to the oral testimony before the ABCMR in 1983 consists of post-hearing letters, in the 1985-1986 time period, from my unit commander and executive officer who were on-site witnesses; six medical doctors including three (3) psychiatrists, one (1) doctor of philosophy (PhD); three (3) lawyers; one (1) Bishop serving as the Vicar General of the Military Ordinariate, the endorsing-licensing body for this plaintiff. The above does not include the new, relevant

evidence of 1991 spurned by the ABCMR in 1993, of Dr. Roark, Lt. Col. (Ret.) Thomas Kelly, and Dr. John Day. (See Par. 54 of Complaint.) Also of note is an unsolicited letter of June, 1990. (App. 19 Complaint).

52. Any assertion that this issue could have been litigated in a prior action is untenable in the light of the ABCMR's obstructive conduct, and the use of tainted evidence in a case of complex ramifications and interrelationships, impinging upon constitutional guarantees. No one has ever ruled on this basic issue of the authenticity and veracity of the putative "Caraway report." (See Par. 79 of Complaint.) This is the issue of ultimate fact which must be adjudicated, along with its inherent and most important implications and ramifications in public policy regarding Chaplains serving in military ranks.

53. 32 C.F.R. Ch.V (7-1-86 Edit.) 581.3 (D)(5)(i) asserts that: "The applicant will be assured of access to all official records that are necessary to an adequate presentation of his case...." How could any previous litigation hold in the face of concealment, removal of an official document in violation of 18 U.S.C. 2071 (a) and (b) which makes such action a punishable offense." 18 U.S.C. 1505, 1506, and U.S.C. 1001 also are applicable here. (See Par. 103 of Complaint.)

54. Rule 44 F.R.C.P. (b) speaks of Lack of Record, and that "after a diligent search," no record is found, as well as further evidence

observable in the certification by the government in the Court of Claims' action (1980) of my Official Military Personnel File (OMPF) as true and exact, but contains no "Caraway report", is admissible as evidence that the records contain no such entry or record.

55. It seems obvious to this pro se plaintiff, despite all the many, many administrative and judicial fora to which he has applied over many years in the face of obstructive tactics, this case comes down to the fundamental issue of genuine fact, triable in court, as to the question of the authenticity and veracity of the "Caraway report," dated 11 October 1961.

56. This is the issue. As to the matter of "failure to make a claim," which the magistrate judge raises, please see Par. 61 of Complaint, in which this plaintiff makes a claim for retroactive back pay and retroactive promotion. (See also Par. 59 of "Objections.") Moreover, in plaintiff's opposition to defendant's Motion to Dismiss in which plaintiff's motion was dated 19 August 1994 on page 2 therein, it is stated: "To make this claim more clear, I would like to amend my Complaint to a claim for fifty million dollars ($50,000,000.00) in compensation for pain, anguish, and damages to my reputation and for injury to my professional status.

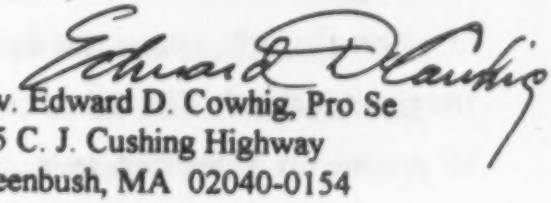
I have been claiming since 1973 when I first learned of the existence of the ABCMR that my separation was illegal, involuntary, null and vod, and so stated at the 1974 ABCMR

hearing. The 1974 decision of the ABCMR under 10 U.S.C. 3785 was and is a "half-loaf," and to this day carries a stigma of "professional dereliction."

This case has never, never been decided on its real merits or with any sense of equity and justice ever since Judge Nichols in the Court of Claims (427-80C) on 27 Februry 1981 in his order therein invoking the statute of limitations stated: "We need not address other defenses raised by the government or the merits of the cause of action." This has been the decision on which "res judicata" has been built. The statute of limitations invoked there and res judicata should not hold or be controlling in the light of the actions of the ABCMR in 1993, their last decision.

Wherefore plaintiff prays that this Honorable court to grant certiorari, reverse the decisions of the lower courts and/or remand this case for a jury trial "de novo."

Sincerely,



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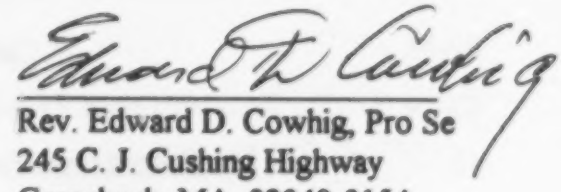
Service Made by Mail 7 June 1996 to:

The Solicitor General of the United States (3 copies)
Department of Justice, Room 5614
10th Street and Constitution Avenue, NW
Washington, DC 20530

Army Board for the Correction of Military Records
1941 Jefferson Davis Highway, 2nd Floor
Arlington, VA 22202-4508



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COMMONWEALTH OF MASSACHUSETTS
ESSEX COUNTY

On this 7th day of June 1996, before me, Bonita O'Gorman, the undersigned, personally appeared, Edward D. Cowhig, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of June 1996.

Bonita O'Gorman
Notary Public

My Commission Expires November 25, 1997

Service Made by Mail 7 June 1996 to:

The Solicitor General of the United States (3 copies)
Department of Justice, Room 5614
10th Street and Constitution Avenue, NW
Washington, DC 20530

Army Board for the Correction of Military Records
1941 Jefferson Davis Highway, 2nd Floor
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Appendix A

[NOT FOR PUBLICATION]

United States Court of Appeals

For the First Circuit

No. 95-1695

No. 95-1991

EDWARD D. COWHIG

Plaintiff, Appellant,

v.

MICHAEL P. STONE, SECRETARY OF THE ARMY, ET AL.,

Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Morris E. Lasker, * Senior U.S. District Judge]

Before

Selya, Stahl and Lynch,

Circuit Judges.

Appendix A

Edward D. Cowhig on brief pro se.

Donald K. Stern, United States Attorney, and Sara Miron Bloom, Assistant United States Attorney, on brief for appellees.

November 15, 1995

---

*Of the Southern District of New York, sitting by designation.

Per Curiam. Having reviewed the record in detail, we affirm the judgment substantially for the reasons recited by Magistrate-Judge Cohen in his Report and Recommendation dated April 6, 1995.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 95-1695

No. 95-1991

EDWARD D. COWHIG

Plaintiff, Appellant,

v.

MICHAEL P. STONE, SECRETARY OF THE ARMY, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: November 15, 1995

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court

FRANCIS P. SCIGLIANO, Clerk

By: _____

Chief Deputy Clerk

[cc: Messrs. Cowhig, Stern and Ms. Bloom]

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD C. COWHIG,

Plaintiff,

v. 94 Civ. 11225(MEL)

MICHAEL P. STONE,
Secretary for the Army,
ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS,

Defendants,

LASKER, D.J.

Defendants' Motion to Dismiss or Alternatively for Summary Judgment was previously referred to the Honorable Lawrence P. Cohen, Magistrate Judge, for a report and recommendation. On April 6, 1995, the Magistrate Judge filed his report which extensively reviewed the facts of the case and the background of repetitive litigation in which the plaintiff has been engaged against the government. The present case is, as the Magistrate Judge described it, "The Fifth Foray."

The report of the Magistrate Judge recommended that the defendants' motion to dismiss or for summary judgment should be granted on the grounds of res judicata. I agree with the conclusion of the Magistrate Judge on the facts and the law. Moreover, the time to file objections to the recommendation of the Magistrate Judge expired on April 16, and no objections to the report have been received from the plaintiff. Accordingly, the defendants' motion to dismiss or for summary judgment is granted and the complaint is dismissed.

It is SO ORDERED.

Dated: Boston, Massachusetts
April 26, 1995

s/Morris E. Lasker
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD C. COWHIG,

Plaintiff,

v, 94 Civ. 11225 (MEL)

MICHAEL P. STONE,
Secretary for the Army,
ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS,

Defendants.

LASKER, D.J.

On April 26, 1995, I granted defendants' Motion to Dismiss or For Summary Judgment. I did so after reviewing and agreeing with the comprehensive report, dated April 6, 1995, of Honorable Lawrence P. Cohen, Magistrate Judge. The motion had previously been referred to him for report and recommendation. I agreed with Judge Cohen that defendants' motion should be granted on the grounds of res judicata, but I also noted that the time to file objections to the Magistrate Judge's Recommendations had expired.

On May 1, the plaintiff filed a "Motion to Revoke Order of 26 April 1995 by Judge Morris E. Lasker And to Reconsider" the matter. Defendant responded to plaintiff's motion

on May 26, 1995 and on June 9, the plaintiff filed a "Motion in Response to Defendants' Motion in Opposition to Plaintiff's Earlier Motion (1 May 1995) to Revoke and Reconsider the Order of Judge Lasker Dated 26 April 1995."

The plaintiff argues that his objections to Judge Cohen's Recommendations were timely filed and refers to Rule 6 of the F.R.Civ.P. which excludes Saturdays, Sundays and holidays from computation of the time in question. The plaintiff may or may not be right that his objections were timely filed. Whether they were or were not is not controlling, however, because the plaintiff's objections to the Magistrate Judge's Recommendations are without merit. As Judge Cohen sets forth in painful detail in his Report, the issues presented by the plaintiff have been litigated to a fare-thee-well, and beyond any question, are barred as res judicata. Nothing contained in the papers submitted by the plaintiff of May 1 and June 9, 1995 undermines that proposition

Accordingly, the plaintiff's motion to revoke the order of April 26, 1995 is denied.

Dated: Boston, Massachusetts

June 13, 1995

s/D.J. Lasker

U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EDWARD D. COWHIG, Pro Se,

Plaintiff,

v. 94 Civ. 11225 (MEL)

MICHAEL P. STONE,
Secretary of the Army, and
the ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS,

Defendants.

LASKER, D.J.

Plaintiff's most recent of his never-ending procession of motions, which he designates as motions under "Fed. R. Civ. P. 59 and 60 for Amendment or Relief from Judgment" are denied. Fed. R. Civ. P. 59 does not apply to this case because the case was not tried but dismissed upon motion by the government; nor is there any basis for granting relief under 60(a) since the plaintiff has presented no clerical mistake in the judgment, order, or any other part of the record. No relief is appropriate under 60(b) (1) (2) (3) or (6) because no new evidence has been presented to support the application under those subsections of the rule.

Why the plaintiff persists in hitting his head against a stone wall by filing motion after motion is puzzling. The decision of this court in dismissing the complaint is appealable to the Court of Appeals. Plaintiff's proper remedy is to file an appeal of that decision.

The plaintiff's motions are denied. It is so ordered.

Dated: Boston, Massachusetts
June 30, 1995

s/D.J. Lasker
U.S.D.J.

Appendix C

UNITED STATE DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No.

94-11225-MEL

EDWARD C. COWHIG

Plaintiff

v.

MICHAEL P. STONE, Secretary for the Army

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

Defendants

REPORTS AND RECOMMENDATION

April 6, 1995

COHEN, M.J.

The above-entitled case was referred to this court for report and recommendation on defendants' Motion to Dismiss or Alternatively for Summary Judgment. This case represents plaintiff's fifth trip to the Third ranch for relief concerning the same subject matter - not to mention other forays to administrative tribunals. Pursuant to Rules 7.1(d) and (e) of the Local Rules of this Court [effective September 1, 1990], and upon review of the

relevant pleadings, this court recommends that that motion be allowed for the reasons set forth below.

A. Facts[1]

1. On January 2, 1951, plaintiff, an ordained Roman Catholic priest, entered active service with the Army as a chaplain. Plaintiff remained an active member of the Army until his discharge from service in January 1962.

In the fall of 1961, Lieutenant General Paul Caraway ("Caraway") allegedly delivered a report to the Military Ordinariate.[2] The Caraway report stated that plaintiff's performance as an Army chaplain was being affected by problems related to alcohol and suggested his dismissal.[3]

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[1] The relevant facts are set forth viewing the record before this court in the light most favorable to the nonmoving party, and considering all inferences favorable to the nonmoving party. Ismert and Associates v. New England Mut. Life Ins., 801 F.2d 536, 537 (1st Cir. 1986).

[2] Chaplains serving within the Department of Defense must be endorsed by an ecclesiastical body. The Military Ordinariate, (now the Archdiocese for Military Services USA) is the organization responsible for endorsing Catholic priests for service as chaplains.

[3] Plaintiff contests the Caraway report both as to its validity and authenticity. Plaintiff maintains that this letter from General Caraway was never written, and offers a hand written statement from General Caraway, (dated June 1979) asserting the same.

The Military Ordinariate threatened to withdraw its ecclesiastical endorsement of plaintiff due to the contents of the Caraway Report. As a result of this threat by the Military Ordinariate, plaintiff was effectively forced to submit his resignation. Plaintiff was discharged from the Army on January 22, 1962.

2. From that date onward, plaintiff has marched from fora to fora - including the Army Board for Correction of Military Records and Article III courts - seeking various and sundry forms or redress, as more particularly set forth below.

(a) Appeal to the ABCMR

In 1966-67, plaintiff applied for readmission to the Army. His readmission was denied due to his inability to obtain a security clearance from the F.B.I.[4]

In July of 1973, plaintiff asked the ABCMR to alter his military records to show that his release from active duty was involuntary. The ABCMR held a hearing on August 14, 1974 where they concluded that plaintiff had resigned under duress; specifically, under the threat of involuntary discharge. On October 15, 1974, plaintiff won a respite of sorts, and the ABCMR ordered the records changed from voluntary release to involuntary release.

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[4] This denial was based upon the same circumstances, i.e., the Caraway report, under which plaintiff was discharged from the Army.

In 1975, plaintiff, not satisfied with this less than total victory, petitioned the ABCMR to have his discharge nullified and to be returned to active duty. This request was denied in 1977.

In 1979, Plaintiff twice sought to have the ABCMR reconsider its 1977 denial. The first time on October 24, 1979, the ABCMR reached the same conclusion as in 1977; dismissing plaintiff's complaint. The second time, after receiving several Congressional inquiries, the ABCMR again agreed to consider plaintiff's request for relief. However, on September 10, 1980, the complaint was again dismissed.

(b) The Court of Claims

In February 1981, plaintiff moved his grievance to federal court, filing suit in the Court of Claims. He sought to have his discharge voided and requested the court to remand the action the ABCMR with directions to correct his records.

On February 27, 1981, the Court of Claims dismissed the action. The court concluded in an unpublished opinion that the complaint was barred by the six-year statute of limitations, 25 U.S.C. § 2501. The Court of Claims reasoned that plaintiff's claim accrued and the statute of limitations began to run at the point of his discharge from the Army in 1962. Cowhig v. U.S., 652 F.2d 69 (Ct. Cl. 1981).

(c) District of Massachusetts - First Foray

On June 25, 1981, not deterred by the Court of Claims dismissal, plaintiff filed a petition for mandamus in District Court for the District of Massachusetts. Plaintiff sought an order directing the ABCMR to determine whether his discharge from active duty was legal. The court dismissed the action, holding it was barred by the doctrine of res judicata. Cowhig v. Marsh, No. 81-1616-C, Slip Op. (D. Mass. March 31, 1982).

(d) First Circuit Court of Appeals - First Foray

Not dissuaded by the reasoning of the district judge, plaintiff filed his first appeal with the United States Court of Appeals for the First Circuit. That court affirmed the district court judgment, adding, to boot, that laches precluded further relief. Cowhig v. Marsh, 693 F.2d 234 (1st Cir. 1982), cert. denied, 460 U.S. 1092 (1983).

(e) Back to the ABCMR - The Second Foray

Not giving up the fight, in 1984 plaintiff returned to the ABCMR. This time the ABCMR granted plaintiff a second hearing. By a 3-2 vote, the ABCMR issued a decision recommending that plaintiff be restored to active duty until his completion of twenty years' active service for retirement purposes. This recommendation, however, was not well received by the chain of command, and it proved to be short-lived, since, on March 29, 1984, the Deputy Assistant Secretary of the Army rejected the

recommendation of the ABCMR, adopted the minority position, and denied plaintiff relief.

(f) And Again Back to the ABCMR - The Third Foray

On February 14, 1986, plaintiff returned again and petitioned the ABCMR for another hearing based on new evidence including written testimony of several doctors and officers of the court. The ABCMR denied this request on May 23, 1986 stating that the evidence did not justify further review.

(g) And A Return to the District of Massachusetts - the Second Foray

Disappointed with the ABCMR's response to his administrative claims, on September 21, 1986, plaintiff filed a second complaint in this court seeking to review (and reverse) the Department of the Army's decision was arbitrary and capricious, and that the new evidence had not been properly considered by the Board. The district judge to whom that case was assigned concluded that plaintiff's complaint was barred both by the doctrine of res judicata, and because the decision of the Department of the Army was not arbitrary or capricious. Cowhig v. Marsh, Mo. 86-2192-Y, Slip. Op. (Oct. 26, 1987).

(h) First Circuit Court of Appeals - Second Foray

Not accepting no for an answer, plaintiff again appealed to the United States Court of Appeals for this Circuit. That court affirmed the judgment of the district court, observing that "there is no doubt that appellant's claim arises out of the same 'transaction' or 'factual grouping', as did his claim in his previous suit." Cowhig v. Secretary of the Army, No. 88-1012, Slip. Op. (Oct. 11, 1988).

(i) Back to the District Court - The Third Foray

On May 16, 1990, the plaintiff filed a third action in this court. Adding a new twist, plaintiff claimed that defendants; the Secretary of the Army, the Army Chief of Chaplains, the Army Surgeon General, the Chief of the Army Legislative Liaison Office, and ABCMR, violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff alleged that defendants engaged in a pattern of fraudulent schemes to deprive him of his due process, religious freedom, and other rights. Plaintiff maintained that the government had obstructed justice, violated statutory law, and consistently and constantly acted in an exculpatory manner. Plaintiff again alluded to the alleged falsity of the report from General Caraway, and insisted that his discharge was wrongfully based upon this report.

Once again, the district judge was not persuaded, and he dismissed this third action, again on the grounds of res judicata and

collateral estoppel. Cowhig v. Chief of Chaplains, U.S. Army, et al., No. 90-11297-WF Slip Op. (April 25, 1991).

(j) First Circuit Court of Appeals - Third Foray

Plaintiff duly appealed this judgment. The United States Court of Appeals duly affirmed.

(k) Back to the District Court, Again - The Fourth Foray

In an attempt to cut his losses short, plaintiff then filed a motion in the district court requesting reconsideration of it's dismissal dated April 25, 1991. Plaintiff's motion was based upon Rule 60(b) of the Federal Rules of Civil Procedure which provides relief from a judgment or order based upon "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. . . " According to plaintiff, this newly discovered evidence was relevant to certain events which occurred in Okinawa in 1961 which led to plaintiff's dismissal from

the Army.[5] The District Court denied plaintiff's motion for reconsideration on March 21, 1992.

(l) And to the Court of Appeals - The Fourth Foray

On his appeal from this latest setback, the United States Court of Appeals for this Circuit affirmed the judgment of the district court on December 7, 1992, concluding that the proffered evidence would "avail Cowhig nothing . . . (because it) is irrelevant to the res judicata, collateral estoppel, and statute of limitations grounds upon which the District Court based its judgment." Cowhig v. Chief of Chaplains, et al., Appeal No. 92-1440, Slip Op. (December 7, 1992).

(m) And Again Back to the ABCMR - The Fourth Foray

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[5] Specifically, the new evidence included August 1991 letters from Lieutenant Colonel Thomas Kelly which suggested the falsity of at least one of the allegations of the letter from General Caraway. Kelly stated that all aircraft were evacuated from the island of Okinawa in 1961 due to a pending typhoon, and not due to the incapacitated condition of the plaintiff, as the Caraway report suggests. Additionally, plaintiff presented March 1985 and October 1991 letters of Dr. George Roark diagnosing plaintiff's medical condition in Okinawa in 1961-62, and October 1992 letter from Dr. John Day Diagnosing Plaintiff's medical condition in the early 1960's and a letter from Dr. Rohde stating the same.

Finding no comfort in the the Third Branch, plaintiff, with the assistance of found support on Capitol Hill, returned to the ABCMR. In 1993, Congressman Moakley, Moran and Livingston, after reviewing docouments pertinent to the case, submitted a letter to the Acting Assistant Secretary of the Army, William D. Clark, ("Clark") asserting that there seemed to be a lack of due process. The letter requested a reversal of the Department of the Army's March 29, 1984, decision. Clark denied this request by letter dated March 8, 1993. By letter dated April 14, 1993, plaintiff submitted a reply and request for reconsideration of his application for correction of military records to Congressman Moakley. Congressman Moakley forwarded that request for reconsideration to the ABCMR. On June 15, 1993, the Department of the Army denied further consideration of its prior decisions stating that no new evidence had been found.

(n) And Finally Back to the District Court, Again - The Fifth (and Present, if not Last) Foray Foray

Having been shut out in every branch of government, plaintiff returns again to this court. Plaintiff now seeks judicial review of (1) the letter dated March 8, 1993 from Clark and (2) the ABCMR's refusal for further review of its prior decisions, dated June 15, 1993. Plaintiff alleges that these actions were arbitrary, capricious, and committed in a bad faith manner.

B. Discussion

For the reasons set forth below, this court recommends that the defendants' Motion to Dismiss or Alternatively for Summary Judgment be allowed.

1. The Summary Judgment Standard

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ. P. 1).

To survive a motion for summary judgment, the opposing party must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P., 56(e); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). As the Supreme Court recently has made clear, the standard for granting summary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). That is, the inquiry focusses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52 "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"

Matsushita, 475 U.S. at 587 (citing First Natl. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

A plaintiff may not obtain a trial merely on the allegations in its complaint, First Natl. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289-290 (1968), or by showing that there is "some metaphysical doubt as to the material facts," Matsushita, supra, 475 U.S. at 586 (citations omitted). Where the non-moving party will bear the burden of proof at trial, Rule 56(c) mandates the entry of summary judgment against that party where it "fails to make a showing sufficient to establish the existence of an element essential to that party's case. . . ." Celotex Corp. v. Catrett, 477 U.S. at 322. That is to say, to avoid summary judgment, the opposing party". . .must produce at least some evidence reasonably affording an inference supporting the existence of a triable issue of fact [with respect to the element which the opposing party must establish at trial]." Santiago, et al. v. Group Brasil, Inc., 830 F.2d 413, 416 (1st Cir. 1987).

2. Res Judicata

Res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Allen V. McCurry, 449 U.S. 90 (1980). A judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality which is conclusive upon the

two parties and those in privy with them. The judgment is final not only as to every matter which was litigated, but also as to any other admissible matter which could have been offered. Cromwell v. County of Sac, 94 U.S. 351 (1876).

Despite prior rulings based on these principles, plaintiff doggedly returns to federal court seeking redress. Plaintiff has attempted countless times over the past 20 years to challenge his 1962 service discharge from the Army. In the federal courts alone, he has filled 5 separate actions, each involving multiple motions and appeals. While plaintiff may feel as though he has been dealt a jaded hand, the federal system cannot and will not ignore the well-settled principles of res judicata.

A party asserting res judicata must prove (1) that the parties are the same, (2) that the earlier judgment was final, and (3) that the cause of action resolved by a final judgment was the same as that presently asserted. See e.g. Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1946).

(a) The parties herein are identical, despite plaintiff's attempts to distinguish the defendants involved in his various suits.

Plaintiff has brought four prior actions, each of which has been against various personnel of the United States.[6] The Supreme Court has held that a suit brought against "an officer of the United States is a suit against the United States itself." Hawaii v. Gordon, 373 U.S. 57 (1973). Therefore, although the plaintiff has nominally changed the defendants, he cannot disguise the fact that he is still pursuing a claim against the United States.

(b) **In each of the prior actions brought by plaintiff, a final judgment on the merits has been entered, and must be given preclusive effect.**

Plaintiff's first suit was dismissed on the grounds that the complaint was barred by the six-year statute of limitations. (28

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[6] In each suit plaintiff seeks redress against the United States. In the first suit, Cowhig v. U.S., 652 F.2d 69 (Ct. Cl. 1981) plaintiff named the United States as defendant. In his second suit, Cowhig v. Marsh, No 81-1616-C, Slip Op. (D. Mass. March 31, 1982), plaintiff named the then current Secretary of the Army, John O. Marsh, as defendant. In plaintiff's third suit, Cowhig v. Marsh, No. 86-2192-Y, Slip Op. (Oct. 26, 1987), he again named John O. Marsh as defendant. In his fourth suit, Cowhig v. Chief of Chaplains, U.S. Army, et al., No. 90-11297-WF Slip Op. (April 25, 1991), plaintiff named the following as defendants: (1) the Secretary of the Army; (2) the Chief of Chaplains, U.S. Army; (3) the Surgeon General, U. S. Army; (4) the Chief, Legislative Liaison Office, U.S. Army, and (5) the Army Board for Correction of Military Records.

U.S.C. sec 2501).[7] "It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect." Kale v. Combined Insurance Co., 924 F.2d 1161, 1164 (1st Cir. 1991), cert. denied, 112 S. Ct. 69 (1991). Accordingly, the courts' determination that plaintiff's claim is barred by the statute of limitations is a final judgment, to be given preclusive effect.

Plaintiff's second suit was also dismissed. There, plaintiff sought an order directing the ABCMR to determine whether his discharge from active duty was legal. The District Court held the suit to be barred by the doctrine of res judicata. Cowhig v. Marsh, No. 81-1616-C, Slip. Op. (D. Mass.Mar. 31, 1982) (effort to gain the previously denied back pay is barred by res judicata).

Plaintiff then filed a third suit which was also dismissed again barred by the doctrine of res judicata. Cowhig v. Marsh, No. 86-2192-Y, Slip. Op. (Oct. 26, 1987) (the issue is precisely the same as that earlier presented; the action is barred by the principles of res judicata).

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[7] The court noted that plaintiff's claim accrued in 1962 upon his discharge from the Army. 28 U.S.C. sec. 2501 (1982) provides that: "Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after the right of action first accrues."

In May of 1990, plaintiff filed yet a fourth suit, alleging on the same set of facts, a RICO violation. The District Court, for the second time, dismissed the action on the grounds of res judicata and collateral estoppel. Cowhig v. Chief of Chaplains, U.S. Army, et al., No. 90-11297-WF Slip Op. (April 25, 1991). Plaintiff appealed each of the three District Court decisions to the Court of Appeals for the First Circuit, and in all cases the that Court affirmed the judgment of the district court. Because plaintiff has received final judgment on each of the four prior actions, he is again barred, in this case, under the principles of res judicata.

(c) **Each of plaintiff's five claims have been identical and are therefore properly barred by the principles of res judicata.**

The third and final requirement under the doctrine of res judicata is that the present claim be identical to those claims asserted in the prior suits. A claim in a prior suit is considered identical to claim in a subsequent suit for purposes of res judicata when the claims both involve a "series of connected transactions" which "derive from a common nucleus of operative facts." Kale v. Combined Ins. Co., 924 F.2d 1161, 1166 (1st Cir. 1991).

The First Circuit has consistently embraced the principles of sec. 24 of the Restatement (Second) of Judgments (1982) establishing this "transactional" definition of the underlying claim or cause of action. Manego v. Orleans Board of Trade, 773 F.2d

1, 5 (1st Cir. 1985), cert. denied, 475 U.S. 1084 (1986). Here, plaintiff's claims have consistently been based upon those transactions which occurred surrounding his 1962 discharge from the Army. Plaintiff clearly seeks the same ultimate relief as he sought in each of the prior suits and his contention that he seeks only a reviewal of the ABCMR's decision simply exalts form over substance.

In each of the four prior suits, and again here in the present one, plaintiff claims he was wrongfully discharged from the Army in 1962. Plaintiff's first complaint, in 1973, alleged that his discharge was wrongfully based on fraudulent reports.[8] The ABCMR ordered a change in plaintiff's record from voluntary to involuntary release, as per plaintiff's request. Two years later plaintiff [emphasis supplied], dissatisfied with his first victory, petitioned the ABCMR to have his discharge nullified altogether, and asked to be returned to active status. The ABCMR denied this request.

Disgruntled with the ABCMR decision, plaintiff filed suit in the Court of Claims.[9] He again claimed that he was wrongfully discharged. Plaintiff's claim was again based upon the veracity of

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[8] Again, the plaintiff contested the veracity of the Caraway Report.

[9] Cowhig v. United States, 652 F.2d 69 (Ct. Cl. 1981);

the letter from General Caraway suggesting his dismissal. When the Court of Claims determined that plaintiff's claim was barred by the statute of limitations, plaintiff merely turned to a different tribunal to again assert the identical claim.

The district court determined that plaintiff's claim was identical to the claim plaintiff presented in the Court of Claims and that therefore plaintiff was barred by res judicata.[10] Plaintiff followed this suit by two more,[11] and today a third.

Plaintiff has attempted several times to have the decision of the ABCMR reviewed. He has asked that the court remand the action to the ABCMR and direct the Board to expunge his records. Cowhig v. United States, 652 F.2d 69 (Ct. Cl. 1981). He has filed a petition for mandamus seeking an order directing the ABCMR to determine whether his discharge was legal. Cowhig v. Marsh, No. 81-1616-C, Slip. Op. (D. Mass. Mar. 31, 1982). Plaintiff has even brought a RICO action against the United States, Cowhig v. , No. 90-11297-WF, Slip Op. (D. Mass. April 25, 1991), alleging a conspiracy to deny him of his due process. In each of these actions

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[10] Cowhig v. Marsh, No. 81-1616-C, Slip Op. (D. Mass. Mar. 31, 1982).

[11] Cowhig v. Marsh, No. 86-2192-Y, Slip Op. (D. Mass. October 26, 1987), and Cowhig v. Chief of Chaplains, et al., No. 90-112997-WF, Slip Op. (D. Mass. April 25, 1991).

the underlying transactions have consistently been those incidents involved in his 1962 discharge from the Army. Plaintiff has attempted to dress his actions in what appears to be different clothing; however the underlying claim has been identical throughout. Accordingly, plaintiff's claim has been consistently and properly barred by the doctrine of res judicata. In an attempt to put on yet another outfit, plaintiff now alleges he has acquired newly discovered evidence which purportedly gives rise to a "new" action. However, it is not "new" evidence, and it does not give rise to a "new" cause of action.

The First Circuit has consistently held that, although a plaintiff may change his theory of recovery, a second case is still precluded by a prior judgment where the underlying facts in both cases are the same. See e.g. Pastercyzyk v. Fair, 819 F.2d.12,13 (1st Cir. 1987) (changing forums and theories does not establish a new claim); Prizio v. City of Revere, 629 F. Supp. 538, 540 9D. Mass. 1986) (for the purposes of res judicata a second claim is not a new claim simply because the plaintiff applies a new legal theory to the same facts). Plaintiff's case here is precisely the same claim which plaintiff has brought before numerous other tribunals. All of the prior proceedings dealt with the same allegations, arising out of the same transactions, that plaintiff is raising here.

Accordingly, it is clear that plaintiff's current action is barred yet again by the doctrine of res judicata. This court

accordingly recommends that defendants' Motion to Dismiss or Alternatively for Summary Judgment be allowed on that ground.

3. The Merits

At all events, plaintiff has failed to state a claim upon which relief may be granted.

As recast yet again, plaintiff seeks review of the decisions of the Secretary of the Army and the ABCMR. Specifically, plaintiff seeks reviewal of (1) the March 8, 1993, letter from Acting Secretary William D. Clark to Congressman Joseph Moakley declining Congressman Moakley's request that the Department of the Army reverse its March 19, 1984 decision; and (2) a June 15, 1993 notification from ABCMR to the plaintiff denying his request for reconsideration of the March 29, 1984 decision.

First, it is clear from the governing statute that the Secretary of the Army was charged with the final decision on plaintiff's claim and was free to disregard any decision by the ABCMR that it deemed necessary. 10 U.S.C. sec. 1552(a); Miller v. Lehman, 801 F.2d 492, 497 (D.C. Cir. 1986). Second, both the decisions of the Acting Secretary and the ABCMR are decisions of a military board that are entitled to substantial deference. See e.g., Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

A prior decision by an appropriate tribunal must be upheld unless it is arbitrary, capricious, unsupported by substantial evidence, or legally erroneous. Hodges v. Callaway, 499 F.2d 417,

423 (5th Cir. 1974). Plaintiff suggests that since the time of the ABCMR's decision in 1984, he has discovered new evidence which he believes is justification for a reversal of that 1984 decision.

The "new" evidence which plaintiff presents consists of three letters written by doctors testifying to plaintiff's medical condition at the time of his discharge, and a letter from a Lieutenant Colonel discussing the weather conditions at the time of plaintiff's discharge in 1962. Of the four letters which plaintiff has presented, three were written in 1991 and one in 1986. This information (i.e., plaintiff's health status and the weather conditions at the time of his discharge) was readily available to plaintiff not only at the time of his discharge) was readily available to plaintiff not only at the time of his discharge in 1962, but also during each of plaintiff's four prior suits.

Plaintiff presented this very same "new evidence" in connection with his Rule 60(b) motion to the district court in 1992. The district court denied that motion and the Court of Appeals affirmed noting that "(n) one of these items of evidence meet the Rule 60(b)(2) requirement that the evidence could not have been discovered in time for a Rule 59 motion." Cowhig v. Chief of Chaplains, et al., Appeal No. 92-1440, Slip Op. at 3 (D. Mass. December 7, 1992). The letter from Lieutenant Colonel Kelly concerning weather conditions at Okinawa could have been available to plaintiff at any time between his 1962 discharge and

1991. The medical diagnosis could have also been obtained through due diligence before 1991. Accordingly, plaintiff has presented no new evidence, and thus his suggestion that the Secretary of the Army and the ABCMR acted in an arbitrary and capricious manner is wholly without merit.

This court accordingly recommends[12] that the district judge to whom this case is assigned allow defendents' Motion to Dismiss or Alternatively for Summary Judgment.

s/

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[12] The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); United States v. Emiliano Valencia-Copete, 792 F.2d 4 (1st Cir.1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also, Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985).

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 95-1695

No. 95-1991

EDWARD D. COWHIG

Plaintiff, Appellant,

v.

MICHAEL P. W. STONE, SECRETARY OF THE ARMY,

ET AL.,

Defendants, Appellees.

Before

Torruella, Chief Judge,

Selya, Cyr, Boudin, Stahl and Lynch,

Circuit Judges.

ORDER OF COURT

Entered January 11, 1996

Appendix D

The motion for rehearing and suggestion for rehearing en banc are denied are denied. We add that, contrary to appellant's suspicion, the record before us at the time the appeals were decided did contain his objections to the report and recommendation of the magistrate-judge.

By the Court:

s/Janice M. O'Neil

Janice M. O'Neil

Acting Clerk.

[cc: Mr. Cowhig, Ms. Winkler, Ms. Bloom]

Appendix E

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 7, 1996

Mr. Edward D. Cowhig
245 C. J. Cushing Highway
Greenbush, MA 02040-0154

Re: Edward D. Cowhig
v. Togo West, Secretary of the Army
et al.
Application No. A-743

Dear Mr. Cowhig:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on March 7, 1996, extended the time to and including June 9, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

Appendix E

By

s/Melissa A. Blalock

Assistant Clerk

Appendix F

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0110

March 8, 1993

REPLY TO
ATTENTION OF
COWHIG, EDWARD D.
016-14-7279

Honorable Joseph Moakley
House of Representatives
Washington, DC 20515

Dear Congressman Moakley:

This is in response to your joint letter of 1 December 1992 in which you request that I reverse my 29 March 1984 decision in connection with the Army Board for Correction of Military Records (ABCMR) case of former Army Chaplain (Captain) Edward D. Cowhig.

As you may know, the ABCMR considered his application in September 1983, and recommended , three to two, that his discharge be voided and he be restored to active duty to complete 20 years service. The minority members recommended his appeal be denied. As Principal Deputy Assistant Secretary I reviewed the

entire file and ultimately adopted the minority rationale and recommendation, thereby denying Chaplain Cowhig's application.

At your request, I have again reviewed the entire case, including his military records and the records of the hearing in his case by the ABCMR in 1983. I regret to inform you that I have found nothing in those records to indicate that either the procedures followed or the action taken were improper or inappropriate.

Chaplain Cowhig's records indicate that as early as 1956, when he was unable to respond to an emergency call for a chaplain due to his over-indulgence in alcoholic beverages and his having been involved in an altercation in a German gasthaus, he has had a problem with alcohol. He was treated at St. Joseph's Hospital in Souther Pines, North Carolina from 3 January 1960 to 6 January 1960 and from 26 February 1960 to 3 March 1960 for acute alcoholism.

Subsequently, as a result of his temperance, Chaplain Cowhig was again unable to perform his duties, was despondent, and had to be hospitalized on three occasions while stationed on Okinawa. Finally, the request of Lieutenant General Paul W. Caraway, the Commanding General of the 2d Airborne Battle Group, he was evacuated from Okinawa to the psychiatric ward at Walter Reed General Hospital. On the weekend of 30 October 1961, while on pass in Washington, and after drinking beer, he

became involved in an altercation at a local Knights of Columbus lodge. He later denied any active role in this incident, but on-the-spot observers disagreed, and felt that his drinking had played a role. He was released from the psychiatric ward on 7 November 1961 with a diagnosis of alcoholism, acute and chronic.

The evidence provided to the ABCMR also reveals that subsequent to his separation from the Army in 1962 he continued to have problems with alcohol which led to several more hospitalizations and his ultimate loss of a church parish.

Although General Caraway did not later recall preparing his 11 October 1961 letter concerning Chaplin Cowhig, I personally have no doubt as to its authenticity based on church documents contained in Chaplain Cowhig's records. For example, those records indicate that on or about 2 October 1961 with a diagnosis of alcoholism, acute and chronic.

The evidence provided to the ABCMR also reveals that subsequent to his separation from the Army in 1962 he continued to have problems with alcohol which led to several more hospitalizations and his ultimate loss of a church parish.

Although General Caraway did not later recall preparing his 11 October 1961 letter concerning Chaplain Cowhig, I personally have no doubt as to its authenticity based on church documents contained in Chaplain Cowhig's records. For example, those records indicate that on or about 2 October 1961, Monsignor

Moran received a letter from General Caraway indicating that the general wanted Chaplain Cowhig returned to the United States immediately. General Caraway felt that Chaplain Cowhig should be presented a letter advising him that he was relieved of his duties. After consulting with Vice-Chancellor Hartman, Monsignor Moran cabled General Caraway to have Chaplain Cowhig evacuated on a "medical board" basis and to have an efficiency report prepared indicating that Chaplain Cowhig had difficulties on Okinawa and was relieved for cause.

Upon receipt of Monsignor Moran's cable, General Caraway had an officer efficiency report prepared for the period 13 July 1961 through 1 October 1961 relieving Chaplain Cowhig of his duties. The report indicates that while he was truly an outstanding chaplain, his performance of duty had fallen below acceptable standards because of his use of alcohol. In addition, General Caraway forwarded his letter of 11 October 1961 to the Chief of Chaplains supporting Chaplain Cowhig's relief from duty for cause.

As you may be aware, in 1986 Chaplain Cowhig filed a complaint in the Massachusetts Federal District Court seeking to overturn my actions in connection with the Correction Board's 1983 decision, contending that I had arbitrarily denied him relief in adopting the minority position.

The District Court dismissed his claim, stating that after thorough review on the merits, his petition was barred by the principle of res judicata, and the Army decisions were not arbitrary or capricious. In October 1988 the First Circuit Court of Appeals affirmed the lower court's decision, citing the same reasoning. The court concurred with the alternative ground for dismissal, stating that records contained ample evidence to support Chaplain Cowhig's discharge due to alcoholism.

His petition for rehearing and suggestion for rehearing en banc was denied on 11 January 1989. He then petitioned the United States Supreme Court, but his writ of certiorari was denied. A petition for rehearing was also denied in October 1989.

In view of the foregoing, and in answer to your question as to whether Chaplain Cowhig was afforded due process, I must say that I believe he was. Chaplain Cowhig was repeatedly involved in incidents related to alcoholic intemperance, behavior which is unacceptable in any commissioned officer, especially one who is a chaplain.

Your interest in this matter is appreciated. I regret that my response cannot be more encouraging.

Sincerely,

s/William D. Clark

Acting Assistant Secretary of the Army

(Manpower and Reserve Affairs)

Appendix G

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON. VA 22202-4508

15 JUN 1993

SFMR-RBR: COWHIG , EDWARD D.

Fr. Edward D. Cowhig

Greenbush, Massachusetts 02040-0154

Dear Father Cowhig:

This is in reference to your 14 April 1993 letter to Congressman Joseph Moakley wherein you request reconsideration of your application for correction of military records under Army Regulation 15-185. Your letter has been referred to this office to determine if your request qualifies you under paragraph 22 of that regulation for reconsideration by the Army Board for Correction of Military Records (ABCMR).

As you have been previously advised, after final action has been completed in a case, further consideration by the ABCMR will be granted only upon presentation by the applicant of newly discovered relevant evidence not previously considered by the Board, and then only upon recommendation of the Board and approval by the Secretary of the Army.

Your 14 April 1993 letter, with enclosures, has been carefully examined in this office in conjunction with the with the available records in your case, including the records of the Board's consideration of your case on 25 March 1984. However, that review did not disclose any new relevant evidence which would warrant the recommendation that your case be reopened.

Accordingly, your request for reconsideration has been denied.

Sincerely,

(signed)

David R. Kinneer

Executive Secretary

Appendix H

DEPARTMENT OF THE ARMY

OFFICE OF THE UNDER SECRETARY

WASHINGTON, D.C.

15 Oct 1974

AG 201 - COWHIG, EDWARD D.

016-14-7279

MEMORANDUM FOR THE ADJUTANT GENERAL:

Having approved the findings, conclusions and recommendation of the Army Board for Correction of Military Records, and under the provisions of 10 U.S.C. 1552, it is directed:

That all Department of the Army records of EDWARD D. COWHIG be corrected to show that he was involuntarily released form active duty under the provisions of Title 10 U.S.C. 3785, on 23 January 1962.

s/Herman R. Staudt

Under Secretary of the Army

Appendix H

Appendix J

CLOSED

U.S. District Court

U.S. District Court - Massachusetts (Boston)

CIVIL DOCKET FOR CASE #: 94-CV-11225

Cowhig v. Stone, et al — Filed: 06/16/94

Assigned to: Judge Morris E. Lasker — Jury demand:

Plaintiff

Demand: $0,000 — Nature of Suite: 440

Lead Docket: None — Jurisdiction: US

Defendant

Dkt# in other court: None

Cause: 28:1983 Civil Rights

EDWARD D. COWHIG	Edward D. Cowhig
Plaintiff	[COR LD NTC] [PRO SE]
	245 C. J. Cushing Highway
	Greenbush, MA 02040-0154
v.	
MICHAEL P.W. STONE, Secretary of the United States Army	Susan G. Winkler
	617-223-9460
Defendant	[COR LD NTC]

Appendix J

United States Attorney's Office
1107 John W. McCormack POCH
Boston, MA 02109
617-2223-9400

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS
Defendant

Susan G. Winkler
(See above)
[COR LD NTC]

Docket as of May 30, 1995 2:56 pm

Appendix K

Bill of Rights

Article I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridgning the freedom of speech, or of the press; or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.

§23.3 Thought, conscience, and religion

§23.3.1 TEXTS

ICPR International Covenant on Civil and Political Rights (in Force 1976)

18 (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

(2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice [emphasis supplied]

Article Four

THE right of the people to be secure [emphasis supplied] in their persons, houses, papers [emphasis supplied], and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article Five

No person shall [emphasis supplied] be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation [emphasis supplied].

Article Fourteen

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION AND STATUTORY PROVISIONS

TITLE 10 - USC

CHAPTER 59.– SEPARATION

§1161. Commissioned officers: limitations on dismissal

(a) No commissioned officer may be dismissed from any armed force except–

(1) by sentence of a general court-martial;

(2) in commutation of a sentence of a general court-martial; or

(3) in time of war, by order of the President.

(b) The President may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three months, or (2) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.

Aug. 10, 1956, c. 1041, 70A Stat. 89.

CHAPTER 359. – SEPARATION FROM REGULAR ARMY FOR

FAILURE TO MEET STANDARDS

Sec.

3781. Selection boards: composition; duties.

3782. Boards of inquiry: composition; duties.

3783. Boards of review: composition; duties.

3784. Removal of officer: action by Secretary of the Army upon recommendation

3785. Rights and procedures.

3786. Officer considered for removal: voluntary retirement or honorable discharge; severance benefits.

10 U.S.C. 3784: Removal of officer: Action by Secretary of the Army upon recommendation.

The Secretary of the Army may remove an officer from the active list of the Regular Army for any cause that he considers sufficient, if removal for that cause is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive. Aug. 19, 1956, c. 1041, 70A Stat. 219.

10 U.S.C. 3785: Rights and procedures

(a) Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be--

(1) notified in writing of the pendency of any proceeding for his removal;

(2) allowed reasonable time to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry and a board of review; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding.

(b) No person may be a member of more than one board convened under this chapter for the same officer. Aug. 10, 1956, c. 10412, 70A

10 U.S.C. 1185: Rights and procedures

(a) Under regulations prescribed by the Secretary of Defense each officer required under section 1181 of this title to show cause for retention on active duty--

(1) shall be notified in writing, at least 30 days before the hearing of his case by a board of inquiry, of the reasons for which he is being required to show cause for retention on active duty;

(2) shall be allowed a reasonable time, as determined by the board of inquiry, to prepare his showing of cause for his retention on active duty;

(3) shall be allowed to appear in person and to be represented by counsel at proceedings before the board of inquiry; and

(4) shall be allowed full access to, and shall be furnished copies of, records relevant to his case, except that the board of inquiry shall withhold any record that the Secretary concerned determines should be withheld in the interest of national security.

(b) When a record is withheld under subsection (a)(4), the officer whose case is under consideration shall, to the extent that the interest of national security permits, be furnished a summary of the record so withheld.

Chapter 96. Racketeer Influenced and Corrupt Organizations

1961 Definitions

As used in this chapter (18 U.S.C./96/et seq.) (1) "racketeering activity" means (a) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotic or other dangerous drugs, which is chargeable under State Law and punishable by imprisonment for more than one year; (b) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955.

32 C.F.R. 581.3(d)(5)(1)

Access to Records: (1) The applicant will be assured access to all official records that are necessary to an adequate presentation of his case consistent with regulations governing privileged or classified material. It is the responsibility of the applicant to procure such evidence not contained in the official records of the Department of the Army as he desires to present in support of his case.

Scope of the Review

Title 5. U.S.C. 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonable delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(a) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(d) without observance of procedure required by law;

(e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of and agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the courts shall review the whole record or those parts of it cited by a part and due account shall be taken of the rule of prejudicial error.

32 C.F.R. 65.4(b)

(b) Criteria for Ecclesiastical Endorsing Agencies: (1) religious faith groups that seek to become ecclesiastical endorsing agencies for the purpose of certifying the professional qualifications of clergy for appointment as chaplains in the Military Services shall obtain DoD recognition through the action of the Armed Forces Chaplains Board (AFCB). To be considered for DoD recognition each religious faith group shall:

(i) Be organized exclusively or substantially to provide religious services to a lay constituency.

(ii) Be able to exercise ecclesiastical authority to grant or withdraw ecclesiastical endorsements.

(iii) Be able to provide continuing validations of ecclesiastical endorsements.

(iv) Be able to endorse clergy who are qualified to provide for the free exercise of religion by all members of the Military Services, their dependents, and other authorized persons.

(v) Abide by the applicable regulations and policies of the Department of Defense.

Part 510 - Chaplains

510.1 Private Ministrations, Sacraments, and Ordinances

Chaplains will conduct or arrange for appropriate burial services at the interment of members of the military service, active and retired, and for members of their families upon request. A chaplain may perform the marriage rite, provided he complies with the civil law of the place where the marriage is to be solemnized and provided all parties concerned have complied with the requirements of the denomination the chaplain represents and with any directives which may have been issued by the military command or higher headquarters. The scope of the chaplains' work will include such ministrations as are held by some denominations or religious bodies as sacraments and by others as rites or ordinances. Chaplains will administer or arrange for rites and sacraments for military personnel and civilians under military jurisdiction according to the respective beliefs and conscientious practices of all concerned.

Rules of Civil Procedure

Rule 60 - Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motions and upon such terms as are just, the court may relieve a party or a party's legal represe..ative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (20< and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as

provided in Title 28 U.S.C. 1655, or to set aside a judgment for fraud upon the court. Writs of coram vobis, audita querela, and bills of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

RULE 1002: REQUIREMENT OF ORIGINAL

To prove the content of writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

RULE 1003: ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

RULE 1004: ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

The original is not required, and other evidence of the contents of a writing recording, or photograph is admissible if--

(l) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure,; or

(3) Original in possession of opponent. At a time when ad original was under the control of the party whom offered, that party was put on notice by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral mater. The writing, recording, or photograph is not closely related to a controlling issue.

ARMY REGULATION 15-815, PAR 22

Reconsideration: After final adjudication, further consideration will be granted only upon presentation by the applicant of newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Army.

Appendix L

UNITED STATES OF AMERICA

DEPARTMENT OF THE ARMY

Washington, D.C.

10 Oct 80

I hereby certify that the attached is a true and exact copy of extracts of the Official Military Personnel File (OMPF) of Edward E. Cowhig, SSAN 016-14-7279, a record of which is in the temporary custody of the Military Personnel Branch, Litigation Division, Office of the Judge Advocate General, Department of the Army.

(signed) M. Scott Magers

M. SCOTT MAGERS

Major, JAGC

Chief, Military Personnel Branch

Litigation Division

I hereby certify that Major M. Scott Magers, JAGC, who signed the foregoing certificate, is the Chief, Military Personnel Branch, Litigation Division, Office of the Judge Advocate General, Washington, D.C., and that full faith and credit should be given to his certification.

Appendix L

In testimony whereof I, CLIFFORD L. ALEXANDER JR., Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed any my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this 21st day of October, 1980.

(signed) Clifford L. Alexander, Jr.

Secretary of the Army

By (signed) Milton H. Hamilton

Administrative Assistant

Appendix M

4450 South Park Avenue
Chevy Chase, MD 20015
11 July 1979

Father E. Cowhig
Saint Jude's Rectory
Main Street
Norfolk, VA 02056

Sir:

I am satisfied that I did not prepare a letter concerning you. Further, in as far as I can discover, no letter concerning you was prepared by any member of my staff or by an employee in my headquarters with or without my consent.

Yours truly
a/Paul W. Caraway
Lt. Gen. U.S. Army

Appendix M

Appendix N

ARCHDIOCESE FOR THE MILITARY SERVICE, USA

(Ordinariatus Castrensis)

962 WAYNE AVENUE

SILVER SPRING, MARYLAND 20910

Telephone (301) 495-4100

FAX (301) 589-3774

Office of the Archbishop March 3, 1995

His Eminence

Bernard Cardinal Law

Archbishop of Boston

2101 Commonwealth Avenue

Brighton, Massachusetts 02135

Your Eminence:

I am in receipt of your letter of 22 February 1995 concerning Father Edward Cowhig. Hopefully, this reply will be of some assistance to Your Eminence in your efforts to assist Father Cowhig.

Bishop John Glynn has spent the last few days culling through the voluminous files we hold concerning this matter. The enclosed copies of correspondence held in our files may be helpful to Your Eminence and to Father Cowhig.

Appendix N

It would appear, from a review of our files, that the action of the Military Ordinariate in October of 1961 concerning the situation of Father Cowhig was, as noted in the enclosed copy of my letter of 1984, based principally on the "Caraway report [emphasis supplied]." A discussion of this report is contained in the enclosed correspondence.

Copies of the other pertinent letters and reports are also contained in the correspondence enclosed.

As a civilian office, we are not, and have never been, a custodian of military records [emphasis supplied].

Since 1990 the Archdiocese for the Military Services has been a co-defendant with the Army in suits initiated by Father Cowhig - in courts all the way to the Supreme Court. Our legal defense, as Your Eminence may surmise, has cost us many thousands of dollars.

I trust that the information noted in this letter will assist Your Eminence in your efforts to help Father Cowhig.

With assurances of my prayers for all members of the great Archdiocese of Boston, I am

Faithfully yours in Christ,

s/+Joseph T. Dimino

Archbishop for the Military Services

JTD/ms

ARCHDIOCESE FOR THE MILITARY SERVICES, USA
(Ordinariatus Castrensis)
962 Wayne Avenue
Silver Spring, Maryland 20910
Telephone (301) 495-4100

19 May 1988

Father Edward D Cowhig
St. Alphonsus Church
488 Elliott Street
Beverly, Ma. 01915

Dear Father Cowhig,

It was good to speak with you again yesterday on the telephone. I did not answer your correspondence earlier because I felt that there was nothing I could add to what Bishop Dimino had already written.

However, let me add now that we do not possess the original letter of Lieutenant General Caraway. This was apparently written to the Chief of Chaplains in military channels. We would not possess such a letter nor are we the custodian of military records or documents.

I do wish you success always.

May the Lord bless you and give you His peace.

Fraternally,

s/Francis . Roque

Auxiliary Bishop

Appendix O

COWHIG, EDWARD D.

016-14-7179

SFMR

Honorable Gerry E. Studds

Representative in Congress

1143 Washington Street

Hanover, MA 02339

Dear Mr. Studds:

This is in further reply to your inquiries in behalf of Father Edward D. Cowhig, concerning his application for correction of military records. Enclosed for your information is a copy o the Board's letter to Father Cowhig which is self-explanatory concerning the Board's most recent action in his case.

The Board's decision to not grant a second hearing in Father Cowhig's case was not based solely on the letter purportedly written by General Caraway and which is now properly in the files of the Military Ordinariate in New York City. The decision was based on substantial, undisputed evidence that he was a practicing alcoholic in 1961, who chose not to abstain from the abuse of alcohol after being hospitalized on several occasions for treatment. His abuse of alcohol resulted in his being relieved of his duties and his being returned from overseas for treatment at the Walter Reed Army Medical Center.

Appendix O

Your interest in this case is appreciated.

Sincerely,

(signed) Raymond J. Williams

Raymond J. Williams

Executive Secretary

Board for Correction

of Military Records

Appendix P

11th Abn Div, APO 1112, NY, o/a 1 Mar 56 (66A)

2d A n Btl Gp, 503d Inf, Ft Bragg, NC 28Mar60 (66A)

OVERUP 196D-OKINAWA

2d Abn Btl Gp, 503d Inf Combat Team, APO 50, SF, 10Jun60 (66A)

Being medically evacuated from Okinawa (to be RAD)

Evacuated via air 6 Oct 61 per TWX from CG USARIS 7 Oct 5 (DA IN)

AHD, Walter Reed Gen Hosp (3401.01), Wash. 12, DC 16Oct61 (660224) (66A)

Appr of resignation to be eff ASAP sent to Sep Br 24 Nov 61. (UP of para 2, AR 635-120)

RAD: 23 January 1962 (DASO 13, 16 Jan62, para 106)

(Resignation)

Cowhig, Edward Dennis — Roman Catholic

Appendix P

Appendix Q

DISPOSITION FORM

No. AGPO_SE 201 Subject: Tender of Unqualified Resignation

Cowhig, Edward D. 0 75 056

Chief, ChapC Br-OAD From: TAG Date 22 Nov 61

Capt Vaughan/gdr /74538

For remark and recommendation.

FOR THE ADJUTANT GENERAL

s/R.C. DAVIDSON

Resig 7 Nov 61, w/4 Ind Colonel, AGG

Chief, Sep Br, TAGO

DCSPER-OAD FROM: Chaplain, OAD

Chief, Sep Br, TAGO Date: 24 Nov 61

Room: 1E 429 M r

Slayton/54554/new.

1. Off (does) ( ) meet the prov of par 2 AR 635-120.

2. a. Gr in which serving Captain b. Perm (RA) Gr Captain

b. Br of svc Chaplain d. Comp RA

3. Date and source of apt (Other) Apt RA Ch 19 Mar 1956

4. a. To act svc (RA) eff 19 Dec 1956 is 4 yrs 11 mos 5 days

Appendix Q

b. To act and inact svc eff 16 Nov 1960 is 11 years 0 mos 5 days

5. Recm (appr) (disappr) resign. (If disappr indc in REMARKS reasons therefore).

6. Recm (appr) (disappr) REFRAD. (If disappr indc in REMARKS reasons therefore).

7. Change of sta orders (not appl)

8. Type of disch certif recm Honorable

9. a. OFF departed CONUS 10 Jun 60. b. OFF depm departed CONUS No Dep

10. Off (is not) curr undergoing course of instr at svc school. If ans is affirmative, please furnish:

a. Course title b. Svc obligation

c. Beginning date d. Ending date

REMARKS: The ecclesiastical indorsing agency concerned will remove Chaplain Cowhig's ecclesiastical indorsement if his resignation is not accepted.

FOR THE CHIEF OF CHAPLAINS:

s/BERNARD J. FENTON

Chaplain (Colonel), USA, Chaplain, OAD

*Delete unless exception to policy is involved.

Appendix R

6 November 1976

TO WHOM IT MAY CONCERN:

Father Edward Cowhig of the Archdiocese of Boston was a chaplain in the Army for several years, and during that time I became very well acquainted with him. We served together in the 11th Airborne Division for about four years. I considered him to be the outstanding chaplain in the Division [emphasis supplied], deeply respected and loved by soldiers and officers alike.

For some reason he was called out of the service by the Military Ordinariate. I have never been given a complete explanation by anyone why this was done [emphasis supplied]. When I became Deputy Chief of Chaplains, and later Chief of Chaplains, one of the first things I did was to try to get Chaplain Cowhig back into the Army, for I felt he epitomized the type of priest that worked most effectively with troops [emphasis supplied], and was most cooperative in the entire religious program. I was told that Chaplain Cowhig's security clearance [emphasis supplied] had been lifted, and the Military Ordinariate offered me no explanation as to why or proof of the fact [emphasis supplied]. Of course, without the endorsement of the Ordinariate, I was unable to process Father Cowhig's application for reentry into the chaplain service.

Appendix R

I still consider Father Cowhig to be an extraordinary priest. I admire his devotion to our country and to the military service. If this letter can in any way help him I shall be grateful.

Very sincerely,

s/Francis L. Sampson

FRANCIS L. SAMPSON

Chaplain, Maj. Gen., U.S.A. (Ret)

Appendix S

George W. Roark, M.D.

205 Locust Court

Issue, MD 20645

October 18, 1991

Fr. Edward D. Cowhig

St. Alphonsus Rectory

488 Elliott Street

Beverly, MA 01915

Dear Father Cowhig:

At your request I am forwarding my opinions concerning the March 1984 reversal of the Assistant Secretary of the Army of the recommendations of a majority of members (3 to 2) of the Army Board for Correction of Military Records (ABCMR) reached in the Board's September 23-26, 1983 Hearing of your petition. I have based this response on my review of a transcript of my testimony before the Board on September 23, 1983; and on the following letters you provided for my examination including:

(1) From - Laurence J. Clark, M.D. to the ABCMR, dated October 24, 1985;

(2) From - Edmund N. Kudarauskas, M.D. to (address unknown), dated November 22, 1985;

(3) From - William A. Rohde, M.D. to ABCMR, originally dated May, 1985; corrected to January 23, 1986;

(4) From - Richard M. Kilfoyle, M.D. to Fr. Cowhig, dated February 6, 1986; and

(5) From - John J. Dowling, M.D. to Fr. Cowhig, dated July 28, 1986.

In addition I re-reviewed my file on you which I had earlier reviewed without the benefit of a transcript of my testimony before the ABCMR, as reflected in my letter to you of March 4, 1985.

As you will recall in my testimony before the ABCMR I drew upon my 5-hour psychiatric examination of you on September 7, 8 and 23, 1983, plus the report from Wolfgang Riedel, Ph.D., of his 3 hours of psychological testing on September 9, 1983. The opinion expressed in the Dissent that my examination was invalidated by the twenty plus years that had passed since your illness on Okinawa (1961-62) does not take into account the intensity, thoroughness and sophistication of your 8 hour examination by Dr. Riedel and myself. The Dissent also shows naivete in assuming that the "facts" I adduced from my examination were based solely on your verbalized memory of events in your life twenty years earlier. Another implication in the Dissent was that my clinical judgment was impaired or unprofessionally influenced by my retention by your attorney for the sole purpose of facilitating his presentation of your case. In interpret this implication as

suggesting that my conclusions were less than objective, if not myopic in effect; and that my motive in accepting your case was less than professional, both of which implications I reject outright. The opinion of the Board (which consisted entirely of non-medical members) should have been reached on the basis of weighing all the facts, as presented, not (as in the Dissent) evaluating the conclusions of the examining psychiatrist and psychologist.

In reviewing the transcript of my testimony, I attempted to respond to questions you asked me to address in paragraphs 1, 2 and 3 of your letter to me dated May 16, 1985. (Please accept my apology for my long delay in responding. I misplaced the first copy of the transcript you had mailed to me in March 1985.)

(1) Para. 1 (of yours of May 16, 1985): The essence or central point of my examination findings and conclusion was that your illness on Okinawa in 1961 was due to a psychoneurosis, (generalized anxiety disorder) which you were attempting to self-treat through increasing your use of alcohol for its tension-reducing and sedative effects. I believe that had your condition been accurately diagnosed, and had appropriate treatment been provided by competent military medical personnel in 1961 or 1962, that your symptoms could have been mitigated or resolved and you then could have return to duty.

(2) Para 2: I could find no reference on p. 160ff. in the transcript of the question of the diagnosis of your condition.

However, on pp. 175, 1988-190 I did draw a clear distinction (based on the current nomenclature of mental disorders of the American Psychiatric Association, D.S.M.-III-R) between alcohol dependence (or addition) and episodic alcohol abuse/misuse secondary to stress or underlying illness. In my opinion you suffered from alcohol abuse in 1961-62, not dependence. (Regretfully, in 1961-62 the nomenclature did not make this distinction clear and the diagnosis of chronic alcoholism was applied both to conditions of alcohol dependence and to various types of alcohol abuse, overuse or misuse.) I testified that in my opinion your abuse of alcohol was a form of self-medication secondary to the stress of your duties and to the recurrent acute feelings of anxiety about the prospect of failure in your assignment.

(3) Para 3: (You have asked me to address a number of issues in this paragraph, some of which I believe I covered in the foregoing.) As to Dr. Franklin's inexperience and questionable competence, the absence in the narrative summary of your Walter Reed General Hospital (WRGH) hospitalization of any reference to the psychologically traumatic loss of your mother, or to the childhood experiences sensitizing you to the possibilities of mutilating injury or death would suggest the same. Presumably, he was supervised in his work so that the failure to secure senior psychiatric consultation and psychological testing may not be laid entirely on him.

The absence of any medical or psychiatric treatment at WRGH is not surprising, given the guarded prognosis for rehabilitation and recommendation for "administrative disposition" of your case by Dr. Franklin. Once again, I believe that the outcome of your hospitalization at WRGH represented an error in the diagnosis and medical management of your case. Had you been diagnosed as having an anxiety disorder and treated appropriately for it, I believe there would have been a favorable prognosis for remission of your symptoms, allowing you to return to your military duties.

I believe the notation in the transcript "no audible response" to a question by Mr. Kabatchnick concerning whether I thought your condition was in the line of duty (LOD) or whether it had existed prior to service (EPTS) reflected my uncertainty as to whether or not I had fully understood his question. I did clarify my opinion on those questions on the bottom of p. 204, "I think . . . he was clearly in the performance of his military duties (LOD) and . . . I doubt that it (the condition of abuse of alcohol, manifested by excessive alcoholic intake under stressful situations) existed prior to service."

Finally, you asked me to clarify my response to a Board member (Mr. Hobbs) asking me to comment on whether your seeking justice and fair treatment from the Army via your petition to the ABCMR amounted to "a crusade". I found may reply on

page numbered "215B": "I don't know whether he thinks of himself as a crusader. I think he may well function in that capacity, in terms of how diligent he's been in preserving in bringing his case to the attention of authorities".

I trust my answers to your specific questions about my testimony and my reiteration of my original findings and opinions about your 1961-62 illness have been responsive to your inquiries and will serve your best interests in the future. As I've mentioned to you in a recent phone conversation, I am now retired from practice and have only very limited time to devote to letter summaries such as this. I hope your life goes well and that your efforts to find relief from the unfortunate reversal of the ABCMR's decision by the Army are successful.

Cordially,

George W. Roark

Appendix T

(Original Prepared May 28, 1985)

SUBJECT: Review of Medical Records

TO: Army Board for the Correction of Military Records

RE: Edward D. Cowhig
Service No. 075056
S.S. No. 016147279

Gentlemen:

This is to certify that I have examined the Army medical records of Chaplain Edward D. Cowhig to determine whether factual medical evidence exists in these records to support a diagnosis of alcohol disease or its stigmata. In performing this review, I paid particular attention to laboratory data, nurses' notes, and the actual reported observations of those who doctored or nursed chaplain Cowhig during his times of hospital confinement. The following findings are apparent:

1. From records presented to me, Reverend Cowhig appears to have been initially hospitalized for the first time during his tour of duty in the Army, except for a displaced cartilage in his knee on July 19, 1960, after approximately ten years of military service. At that time, he is described as having been admitted as 0230 hours, "No evidence of A or N." The nursing notes how that

he was cheerful, well-oriented, and appeared to be his usual self. A flocculation test of liver activity was slightly abnormal but not generally considered to be outside of the normal range. The retention of a dye (BSP) at 5-8% again, is not outside the normal range, and, while the excretion rates ordinarily may have been expected to be slower, at this time, he was complaining of Shigella, which no doubt would involve some deterioration at least temporarily of liver function, is the most likely one I could determine from the presenting data of this admission. No etiology was specified for the alleged fatty liver degeneration at the time of the admission.

2. The next Army Hospital admission was on 2 Feb. 1961 "due to anxiety, tremulous, insomnia." There was no GI symptoms reported at that time. According to the physical examination there was an elevation in blood pressure of 154/90 the liver is said to be palpable three fingerbreadths below the right costal margin. Significantly, it is noted that these is no icterus, no particular muscle atrophy, and no "spiders." Laboratory studies, including a flocculation test again and a repeat of the BSP, were essentially unchanged from the previous studies, and, again, all within normal limits.

The hospital course, narrated in the Discharge Summary, repeats that the patient was symptomatically treated with paraldehyde, when, in fact, medication records from that

hospitalization show that 38 cc. paraldehyde was given over a 24-hour period. He was never disoriented or delirious, and vital signs were stable throughout. This is most consistent with anxiety of his just having had bad news rather than alcohol withdrawal. Of even more significance are the doctor's orders largely related to liver tests and vital signs (vital signs were normal throughout the hospital stay and I expect that the initial complaints of anxiety and nervousness are responsible for the elevated systolic pressure at the time of admission. Apparently, Rev. Cowhig rested in the hospital for some 8 days, during which time did receive 2 doses of chloral hydrate 0.5 grams at bedtime, and there is no further evidence during this hospitalization that any attempt was made to measure his serum alcohol concentration at the time of admission or that he was approached by any alcohol counselor during the time of his stay there, or that the subject of his drinking is made the matter of any note written by any nurse of doctor during the hospital stay. There is a note that psychiatric consultation was requested, but apparently when seen briefly by the psychiatrist on 7 Feb. 1961, Lt. Col. Hannum only sought to speak with the attending physician and makes no mention in his note about the patient's mental status, so that I do not believe the mere event for requesting psychiatric consultation should be considered since no report is available. Apparently, after that hospitalization, Rev. Cowhig was returned to active service duty.

3. On 30 March 161, there is the report of a routine annual medical/physical examination, again bearing the finding of "hepatomegaly," but when summary of defects and diagnosis is stated, the only diagnosis is coded as 2790--obesity; and the only recommendation made at that time was weight reduction. Since this examination was proximate to the time of other hospitalization, it is both surprising and puzzling that no mention is made of the patient's alleged alcohol abuse, nor is any significant update brought about during the annual physical, leading me to believe that it was simply not a problem, or at least it was not a problem affecting his military performance.

4. In reviewing the above data, in which Rev. Cowhig is recorded as having been admitted to hospitals with symptoms of anxiety, tension, and insomnia, with no evidence of alcohol or narcotics, I do note that there is a curios report during his Feb. 1961 hospitalization which alleges that he "apparently has not reported to work for 4 days." This is, indeed, curious as a footnote late in the progress records of the hospital, and I have no idea why it would be originally included in a doctor's progress note, since it appears to have no bearing upon the patient"s condition and it does not state or even attempt to explain why this material was placed in the chart in this matter at this time, when I would certainly expect such material to be part of the Admissions Note. It is noted as hearsay and should remain so. This alleged absence was

dereliction of duty. It is out of place and of no consequences. I could not conclude, therefore, that it was relevant to the factual discussion of Rev. Cowhig's state of health or his putative substance abuse.

5. He was hospitalized again 18 Sept. 19612 at 2315 hours; no evidence of A or N. This admission for the first time entertains a diagnosis of "Alcoholism, acute and chronic, moderate; manifested by excessive alcohol intake under stressful situations." Stress--minimal; normal military duties. Predisposition--moderate, or long history of excessive alcoholic intake. Medical impairment for duty--none. Specialized treatment...again there is no evidence from the medical record that objective examination could have supported this diagnosis and certainly there was no blood alcohol level. Despite the stated diagnosis of "acute alcoholism," there is not even any remark that the patient smelled of alcohol at the time of admission, and this is very unusual among military medically-trained personnel who almost automatically report such observations. He was not considered medically impaired for duty.

6. From Okinawa, Rev. Cowhig was transferred to the Walter Reed General Hospital on 16 October 1961. It appears at this time that the diagnosis of alcoholism, chronic and acute, had simply been repeated from old records. I must say that acceptance of such a diagnosis without supporting data is difficult for me to believe on the part of a hospital with the reputation of Walter Reed

General; however, it does appear that this is the case. Significantly, in the "Summary" prepared by Gerald S. Franklin, Capt. MC, there is no specific alcohol or drug history taken. Here again, it is more likely from examining the objective evidence, that Rev. Cowhig was suffering from an acute anxiety disorder or depressive disorder. There is no evidence at all, which is indeed surprising, that alcohol was even a contributing factor in these episodes. Anxiety most certainly would have occurred in his life whether or not he was subject to bouts of substance abuse. In light of the lack of quantitative factual laboratory data, it is puzzling that a patient who was initially diagnosed as having "hepatomegaly and fatty degeneration of the liver," a condition which is almost certain to be fatal, and which certainly would have been exacerbated by the alleged further drinking bouts, by the time he reached Walter Reed that diagnosis had disappeared entirely from his medical records. It would appear to have been convenient to label Father Cowhig as an alcoholic, rather than consider any other differential for the anxiety condition with which he presented.

I also note that, on page 3, Register No. 6133-052, the notion "EPTS" appears for the first time. Again this is not documented elsewhere in any record known to exist prior to Father Cowhig's admission to the Service (11 years prior to this note), he would have been refused admission to the Service in the first place, or, if he had willingly concealed a pre-existing alcoholic condition,

surely this would be very well documented for determination of service-connected benefits if for no other reason.

Again, from the Walter Reed admission, in Capt. Franklin's note, "The hospital course was at all times compliant with ward routine and exhibited much enthusiasm and encouragement for others in-ward athletic activities. He was angry and impatient about the circumstances of his hospitalization, continuing to be more comfortable projecting blame for his plight rather than accepting responsibility for it. However, superficial recognition of the problem led to a resolution of "abstinence." Despite this description of his compliance with work routine, and his enthusiasm, his present condition is described as correspondingly guarded prognosis for successful adjustment in the military. I find it difficult to move from the facts presented above to the conclusion presented below, since there is a total lack of corroborating information, and remarkably there is no psychological testing, which I believe must be present in order to make such a grave prognosis in the light of an absolutely exemplary 10 year service record prior to the onset of these stress-related complication, and I do not believe that the label of alcoholism can be, or ever was, justified by anything known to me.

It would not have surprised me were Father Cowhig to freely admit to consumption of alcohol under stressful situations. I would, however, expect that those attending him, especially his

physicians, and especially those battle-trained, would have been sensitive to fatigue, stress, and strain reactions that are often seen in those given special command and privileged to special information in situations which are constantly changing. I would think that if his commanding officers and those around him had been more supportive of his personal situation, they would not have fixated on whatever alcohol intake he may or may not have consumed and that a shabby outcome such as this would have indeed been prevented. Or at least I would hope that modern, conventional military medicine would have recognized the true nature of his problems and offered him the support that he needed; perhaps the guidance to assume his responsibilities less seriously or perhaps to avoid extending himself in areas where he was over-stressed and fatigued.

I doubt that further medical information is likely to come to light which could modify my opinion, and I would be glad to stand before any board or tribunal and discuss these results.

With all best wishes,

Sincerely yours,

s/William A. Rhode, M.D.

Member of American Academy of psychiatry and the Law

Board Certified, Psychiatry and Neurology

Clinical Instructor in Psychiatry,

Col. Harvard Medical School

Appendix U

AFFIDAVIT OF

COLONEL ROBERT E. McMAHON, U.S. A. (Rtd), 082-32-1341, commander of the 2nd ABN/503rd Infantry from May 196-0 to July 1962, submit the following comments concerning the Minority Report (Dissent) of the Army Board for the Correction of Military Records, dated 21 and 26 September 1983, in the case of Father Edward D. Cowhig, 016-14-7279:

Reference par. (c) of the Minority Report:

I know of no occasion where "the applicant's abuse of alcohol was affecting his performance of duty and tarnished his image as an officer and Army Chaplain." On the contrary, he carried out all his duties in an exemplary manner. His character was impeccable; his conduct was flawless; he was admired and respected by all who knew him.

Further, I know of no time wherein Father Cowhig "failed to go to work for four days because of being incapacitated due to abuse of alcohol." As far as I know, Father Cowhig never avoided, shirked, religious duty. On the contrary, he was always on duty with his troopers, constantly working with them; planning, creating, and implementing ways to make them better soldiers.

Additionally, "that his drinking problem was a matter of record in an Officer Efficiency report," The Minority Report was

incorrectly based on part on the Officer Efficiency Report (OER) for the period 13 July 1961 to 1 October 1961 that I endorsed on Father Cowhig wherein I misjudged his illness. This OER was misleading, and did not present the facts accurately. I am certain that the Majority of the Army Board for the Correction of Military Records felt that the OER should have been voided and expunged from Father Cowhig's record for they recommended that he be restored to duty and promoted to the grade of Major. I felt that the time of notification and dispatching the OER was unusually short. I failed to give the OER the in-depth analysis required of such an important document affecting the career of Father Cowhig. I prepared the OER primarily from the medical reports of 27 July 1960 and 24 February 1961, and in addition, from the recommendations of Lt. Col. Hannum, Chief of the Neuropsychiatric Service at Camp Hue Hospital (Okinawa). Any reference of inference that I made to Father Cowhig concerning alcoholism was incorrectly derived from these two medical reports, discussions with Lt. Col. Hannum, and Father Emmett Walsh, Senior Catholic Chaplain, Headquarters, U.S. Army Ryuku Islands/IX Corps (Okinawa). I erroneously came to the conclusion that Father Cowhig attend a group therapy meeting at the hospital on Okinawa, which I was led to believe was going to be a session conducted by an experienced medical person. Instead, the moderator was a private or corporal from the hospital.

In my opinion, Lt. Col. Hannum incorrectly diagnosed Father Cowhig's medical problem. His emphasis was on alcoholism, and not the real problem, namely, that Father Cowhig was suffering from severe case of anxiety and hypertension that required immediate expert medical treatment. If Lt. Col. Hannum had emphasized the fact that Father Cowhig's primary problem was severe hypertension, and not alcoholism, my OER would have brought that fact out, and placed it in proper perspective. With this knowledge, I would have endorsed PART VI (Over all Demonstrated Performance) under (b) of the OER as EXCEPTIONAL with a value of 90, instead of (3) EFFECTIVE with a value of 40.

Reference par. (D) of the Minority Report:

As I mentioned above, Father Cowhig's primary medical problem was severe hypertension encompassing high blood pressure and great emotional tension. His many hospitalizations should have properly identified this number one cause of his medical problem; especially, Lt. Col. Hannum when he first saw Father Cowhig in February 1961. He should have insisted that Father Cowhig be immediately be evacuated to CONUS for expert medical treatment. The medical profession was negligent in permitting Father Cowhig's condition to worsen, and to drag on for another year; worse of all, allowing Father Cowhig to be labelled an alcoholic. Father Cowhig knew that his real problem was

extreme anxiety and hypertension, that he needed expert medical help, and that group therapy could not help him. Consequently, their outward impression that he half-heartedly attended group therapy session on Okinawa.

Reference par. (e) of the Minority report:

This paragraph gives the wrong impression about Father Cowhig received proper medical treatment and psychiatric evaluation while on active duty, that he was seen and examined by two qualified psychiatrists who properly diagnosed his alcohol related problems.

The two psychiatrists were undoubtedly, Lt. Col. Hannum (February 1961 in Okinawa), and Captain Franklin (October-November 1961 at Walter Reed Hospital). Judging from my contact with Lt. Col. Hannum, I would say that he made a very cursory and meaningless evaluation of Father Cowhig's condition. According to Father Cowhig, his meeting with Lt. Col. Hannum in February 1961 was neither an examination, or treatment or evaluation. The meeting took approximately 15 minutes; certainly not sufficient time for a thorough diagnosis of Father Cowhig's medical problem.

I noticed in the record of the Army Board for the Correction of Military Records that Captain Franklin was not an expert in psychiatry having recently or just completed his training program in psychiatry at Kaiser Found., San Francisco, Calif. in

June 1961, and began his residency at Walter Reed General Hospital, Washington, D.C. in September 19651. (Exhibit #2 at 1983 HEARING); further, that he was not a Board-Certified psychiatrist. As a result, Captain Franklin lacked the proper experience necessary to treat Father Cowhig in October 1961 when Father Cowhig was his patient. Hence, there is one psychiatrist attending Father Cowhig, Lt. Col. Hannum who did not conduct a proper medical evaluation in February 1961, and the other, Captain Franklin, had just begun his residency at Walter Reed Hospital in September 1961.

I also direct your attention to the fact that Father Cowhig was told to resign on 31 October 1961, and the diagnosis of his medical case prepared by Captain Franklin was made on 6 November 1961, merely restating the diagnosis made in Okinawa. For all practical purposes, Father Cowhig's career in the Army terminated on 31 October 1951 without the Army even considering Captain Franklin's report, the second so-called qualified psychiatrist.

It is important to note that the 2nd Airborne Battle Group/503rd Infantry was an elite parachute combat team strategically located on Okinawa for possible military operations in South East Asia; one such mission was assigned to the unit in January 1961, and was later canceled. Father Cowhig as a select member of this organization had access to security information on

a "need-to-know" basis. No one, outside of a few select individuals, knew the gravity of the situation that confronted the 2nd Airborne Battle Group/503rd Infantry at that time.

As a result, father Cowhig convinced that his troopers would soon be committed to combat, with the strong possibility that many soldiers might be lost, feverishly stove to have them make their peace with God, beforehand. To him, his tasks seemed insurmountable, and most difficult, for time was short. His men did not know of a probable real combat mission. Frustrated and under severe mental pressure, Father Cowhig worked incessantly to get his job done. Finally, after three or four sleepless nights through sheer mental and physical exhaustion, he voluntarily checked into the hospital on Okinawa on 2 February 1961, suffering from complete exhaustion and severe anxiety.

Thus we see that Father Cowhig with security restrictions handing over his head could not make the medical or his ecclesiastical superiors aware of the difficulties of accomplishing his mission; nor could they fully understand the mental anguish that Father Cowhig was suffering.

To an observant psychiatrist, the warning signs concerning Father Cowhig's condition were there indicating medical treatment. However, they were ignored. Instead, alcoholism was listed as the cause of Father Cowhig's problem.

When Father Cowhig left Okinawa for CONUS in October 1961, I thought that he was returning for medical treatment. I thought that he would return to the Battle Group. I had no idea that he was being forced to resign from the U.S. Army. If I would have known that, I would have fought vigorously to retain him on active duty.

In short, the whole scenario of Father Cowhig's tragic career from February 1961 to his involuntary resignation is racked with errors, misunderstandings, innuendoes, and prejudice.

I am positive that if Father Cowhig had received immediate medical treatment after his first hospitalization in July 1960, or the latest in February 1961, that he would have fully recovered and been returned to active duty.

I strongly recommend that the injustice that has been done against Father Cowhig while in the U.S. Army be rectified as advocated by the Majority Report of the Army Board for the Correction of Military Records.

s/Robert E. McMahon
Colonel, U.S.A. Rtd.
1760 Avenida del Mundo
Coronado, CA 92118
Dated 30 March 1985

Appendix V

10 July 1985

STATEMENT

I, Chester B. McCoid, 566-54-2624, Colonel (Retired), U.S. Army, submit the following observations. These concern the 29 March 1984 memorandum of the Principal Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) (PDASA). The document addresses the appeal of Father Edward D. Cowhig, 016-14-7297, to the Army Board for the Correction of Military Records (ABCMR). The hearings bearing on the matter were held at the Pentagon Building on 21 and 26 September 1983.

The thrust of the PDASA's memorandum is a denial of the Cowhig appeal, based on an embracing of the ABCMR Minority Opinion. At the risk of appearing cavalier, and of being too emotionally involved in the matter, I must respectfully disagree with the PDASA's action.

Attention is again invited to the fact that the damning Efficiency Report, prepared by me on such short notice on the occasion of Chaplain Cowhig's evacuation of Okinawa, was inaccurate. This basic document, which was used to justify much of the action taken against Cowhig at the time, still impacts on the case. I feel that it should be stricken from the official record.

In my oral testimony on 21 September 1983, I failed to stress how fully the Chaplain participated in operational planning and how comprehensive was his knowledge of impending classified operations in Southeast Asia. In large measure the hostility of the USARYIS Chaplain to Father Cowhig was a result of the latter being unable to inform the former as to exactly why USARYIS-assigned duties could not be undertaken. USARYIS was an administrative headquarters at the time, and Chaplain Emmett Walsh had no "Need to Know." Clearly Cowhig could not keep the Assistant USARYIS Chaplain brief on the 503d's activities, in light of existing security restrictions, and this Walsh could not and would not accept. Indeed, he suggested that Cowhig was uncooperative and avoiding tasks properly assigned. In any case, this was a key element in the USARYIS view of the Cowhig matter.

Now to the Minority Findings, ABCMR. Although honestly drawn, there are three points contained in the report which do not square with the situation existing on Okinawa in 1961. These are:

1. At no time was our Catholic Chaplain absent without authority from Headquarters, 2d Airborne Battle Group, 503d Infantry Combat Team. He met every requirement fully, both as to time and place. There were occasions when he could have remained on leave or pass and allowed his functions to have gone

undone. Yet, he always managed to see that our troopers were properly cared for, and this at the cost of great personal effort in some instances. To suggest that our chaplain was AWOL for a period of four (4) days simply is not true.

2. Although Cowhig drank, as did we all, he always performed his duties in brilliantly successful fashion. Had the Chaplain been guilty of the acts of omission and dereliction leveled by his accusers, morale in the 503d would have suffered. I assert here, without equivocation of any sort, that the morals and morale of our troops were never higher than when Cowhig was our senior Chaplain. I further state that in my opinion, Cowhig was not an alcoholic. This judgment is buttressed by the fact that I had been instrumental only months before in boarding our S5 (Civil Affairss) for just that failing. Additionally, in nearly thirty-five years of service, I had seen many alcoholics and know that Cowhig, with whom I had almost daily contact, simply did not fit the pattern.

3. Much has been made of the Cowhig failure to attend or to participate fully in Alcoholics Anonymous activity in Okinawa. Here was an alleged requirement of which I was not then aware -- and one with which I would never have agreed, knowing the man. Even conceding that AA might have been useful, and I make so such concession, this was supremely cruel prescription. The net effect would have been to compromise the position of a marvelously useful moral leader and counselor of men

in trouble. One must wonder whether anyone in such a situation, alcoholic or not, could have participated in any such program and still gotten his job done. I suggest that once any Chaplain's AA involvement became widely known -- and this would be a certainty -- his usefulness would be ended. It is easy to dismiss this contention, of course. Yet one must place oneself in Cowhig's position at the time. He would surely know that AA attendance, even if indicated by "qualified medical doctors and psychiatrists," would ruin him as a Chaplain. Now, add his feeling that his problem was associated with overwork and hypertension, and one can see that he was faced with an impossible situation. The question is moot. Cowhig never was ordered to attend AA and in fact, never did attend these meetings and at that time in no way could be termed an "AA Failure," as the 'Minority Asserts.'

Now a final comment. Despite the PDASA's busy schedule, it is disquieting to contemplate a mere 24-hour interval between receipt of the ABCMR report and associated recommendations, adoption of the minority position, and publication of his memorandum to that effect. While the Cowhig appeal may be small potatoes in Washington, the man's damaged reputation and the cause of equity and justice would appear to have deserved a less hurried ending.

s/Chester B. McCoid
Colonel, U.S. Army (rtd.)

67 Bell Street

Middletown, Conn. 06457

Appendix W

DEPARTMENT OF THE ARMY

Office of the Assistant Chief of Staff for Intelligence

Washington, DC 20310

August 7, 1984

Freedom of Information Office

Mr. Edward D. Cowhig

Greenbush, Massachusetts 02040-0154

Dear Mr. Cowhig:

This is in response to your letter of July 21, 1984, in which you request more information about the classification of information that you possess.

Dependent upon the state of international affairs, the information you possess is classified from CONFIDENTIAL to SECRET. Unfortunately, due to operations security constraints and the potentially very sensitive nature of the information, I am unable to provide any further details at this time. I am sure that you understand the national security considerations involved.

Once again, I thank you for your cooperation in protecting information that you possess as a result of you military service.

Sincerely,

s/Anthony J. Gallo, Jr.

Colonel, General Staff

Director of Counterintelligence

Appendix X

2 March 1978

Chief of Legislative Liaison

Honorable Thomas P. O'Neill, Jr.

Speaker of the House of Representatives

Dear Speaker:

This replies to your inquiry in behalf of Reverend Edward D. Cowhig concerning his desire to locate certain correspondence which he believes to be on file in his Official Military Personnel Record.

Examination of Reverend Cowhig's Official Military Record fails to disclose any correspondence from Lieutenant General Paul Caraway to officials in the Department of the Army or to Cardinal Spellman.

Sincerely,

s/Charles L. Moore

Lieutenant Colonel, U.S.A.

Deputy, Congressional

Correspondence Agency

Appendix X

Appendix Y

Rule 44(b)

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

18 U.S.C. 2071

Concealment, removal, or mutilation generally

(a)Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies,

or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

18 U.S.C. 1506

Theft or alteration of record or process; false bail

Whoever feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect or;

18 U.S.C. 1505

Obstruction of proceedings before departments, agencies, and committees

Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee or either House, or any joint committee of the Congress; or

18 U.S.C. 1001

Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.